SUMMARY.

Points for Argument.

1. Candy and chocolate are essentially different products.

2. The consistent distinction between chocolate and candy to be found in internal revenue acts and tariff acts from 1792 to the present time is controlling, in the absence of any expression by Congress of an intention to the contrary.

3. The structure and legislative history of the subdivision providing for a tax on candy in Section 900, Title IX, of the Acts of 1918 and 1921 indicate that Congress did not intend to impose a tax on chocolate.

4. Article 22 of Treasury Regulations 47 under the Act of 1918, and Article 19 of Treasury Regulations 47 under the Act of 1921 are both invalid.

ARGUMENT.

1. Candy and chocolate are essentially different products.

For the convenience of the Court, counsel for the respondents have appended to this brief (pages 86 to 88), a transcript of the definitions of "candy" and "chocolate" appearing in various accredited dictionaries. The purport of these definitions is exceedingly plain. "Candy," to quote Webster's New International Dictionary (1927), is "a more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystallizing, molding, or working it into the required shape." "Chocolate," on the other hand, is, according to the same authority, "a preparation composed of the roasted seeds of the cacao ground and mixed with other ingredients, usually sugar, and cinnamon or vanilla." As the respondents view the matter, chocolate is no more candy than a score of other substances which might readily be named and which are sometimes used as ingredients of candy.

WORDS AND PHRASES, a recognized law dictionary shows that "candy" (see Volume I, 1914, 2nd Series, page 558; Vol. II *id.* page 589; Volume IV *id.* pages 664, 772) and "chocolate" (see Volume II, 1904, 1st Series, page 1144) have been defined separately by the Courts.

In addition to dictionary definitions these words have been scientifically defined by the Secretary of Agriculture in connection with establishing standards of purity for food products, pursuant to authority given by the Acts of Congress of June 3, 1902, 32 Stat. L. 286, 296, and March 3, 1903, 32 Stat. L. 1147, 1158. It was not contended in the Court below, and it is not contended here, that these definitions are binding in the case at bar. They supply, however, a technical or scientific definition of candy and of chocolate, which it may be assumed that Congress had knowledge of prior to the passage of the statutes in question, as these defintions were made pursuant to the express direction of Congress. Moreover, they were made, by the statutory authority above recited, expressly "for the guidance of the officials of the various states *and of the courts of justice.*" (Acts of Congress of June 3, 1902, 32 Stat. L. 286, and March 3, 1903, 32 Stat. L. 1147.) Finally, it is averred in paragraph 11 of the plaintiff's statement of claim—which was duly offered and admitted in evidence because not denied in the affidavit of defense and which appears on page 5 of the Record—that "there is no authority vested by Act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, * * * of food products including Cacao products for the United States of America," and that "the definitions * * * by the Secretary of Agriculture * * * are legal definitions of food products for the United States of America."

But the Secretary of Agriculture was authorized to do more, and actually did do more, than merely to propound definitions. *He was authorized to classify, and in collaboration with the Association of Official Agricultural Chemists of the United States, and other experts, did classify, a variety of food products, including candy and chocolate.*

These official classifications show candy classified under Section C, "Sugar and Related Substances," and defined as follows (see Second Column Plaintiff's Exhibit 13, reproduced on pages 64 to 68 of this Brief):—

> "*Candy* is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug" (p. 68, this Brief);

and sweet chocolate and sweet milk chocolate classified under Section E, "Tea, Coffee and Cacao Products," and defined as follows (see Third Column, pages 64 to 68, of this Brief):—

> "*Chocolate* is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ. *Sweet chocolate* is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices or other flavoring materials. *Sweet milk chocolate* is sweet chocolate which contains not less than twelve per cent. (12%) of whole milk solids in the finished product" (p. 68 of this Brief).

The official documents showing these classifications and definitions will be judicially noticed in cases tried in the Federal Courts (**Thornton v. United States, 271 U. S. 414, 420**), but in the case at bar it is not necessary that the Court should take judicial notice of them because, as has previously been pointed out, they are made a part of the record by the pleadings and offers in evidence. See the summary or table constituting plaintiff's Exhibit 13, a copy of which is appended to this Brief (p. 64). *It should be noted particularly that "the definitions are so framed as*

to exclude from the articles defined substances not included in the definition." Certainly, therefore, chocolate was not candy in the technical or scientific sense at the time the Revenue Acts of 1918 and 1921 were enacted, or at the time the taxes here sought to be recovered were assessed and collected.

When Congress speaks of *"candied* popcorn" and *"candied* fruit," etc., as it does for instance in the Tariff Acts of 1911, 1913 and 1922 (see Plaintiffs' Exhibit No. 12, pp. 79, 80 and 81 of this Brief) and elsewhere, it is obvious that reference is made to popcorn or fruits covered or preserved with a preparation having as its base boiled sugar. If the same popcorn or fruit were covered with sweet chocolate or sweet milk chocolate it would never be known or called *"candied"* but always as *"chocolate covered."* This distinction is recognized by the Secretary of the Treasury, himself, in his various Regulations (see bottom of page 82 of this Brief) wherein he repeatedly lists *"chocolate covered* fruits and nuts" as one thing and *"candied* fruits and nuts" as something entirely different.

The fact that the lexicographers and the authorized departments of the Federal Government and Congress itself have so consistently expressed the difference between sweet chocolate and sweet milk chocolate on the one hand and candy on the other is merely a reflection of the fact that they are different commodities and can never be the same.

Reference has been made to the works of reputable lexicographers as showing the everyday household use of the words "chocolate" and "candy" and to the technical or scientific definitions of these words framed by the Secretary of Agriculture. All of these definitions are entirely harmonious, and all of them point to the same obvious distinction. *There is, moreover, no evidence in the case, either oral or written, at variance with this distinction.*

The testimony of the three witnesses called by the Government need not be discussed at length. Louis Newhoff, a wholesale confectioner, testified that he bought sweet chocolate and sweet milk chocolate from the plaintiff and sold it to his customers, including jobbers in groceries and

drugs, but that he also bought and sold salted peanuts, candied fruits, raisins and small cakes, and, as a side line, small toys and balloons (Record, pages 52-55). This testimony clearly shows that "chocolate" was handled as a product well known in the trade, and that when a purchaser asked for "chocolate" he was given "chocolate," and when "candy" was asked for chocolate was not given. Albert Schneider, a foreman for S. S. Kresge Company, testified that the plaintiff's milk chocolate is carried in what is known as the candy department of his employer's chain of stores, but that chewing gum, raisins, peanuts and glass novelties filled with candy are carried in the same department (Record, pages 56-58). Israel Margolis, both a wholesaler and retailer of confectionery, testified that he handled the plaintiff's products and sold them as chocolate, but that he also handled tobacco, ice cream supplies, raisins, cough drops, mint, chewing gum, salted nuts, balloons, rubber balls, clay pipes and trinkets (Record, pages 59-61).

In **United States v. Cattus, 167 Fed. 532,** the Circuit Court of Appeals for the Second Circuit held that artificial shamrocks made of silk and metal, used by the Irish of all ages as national emblems on St. Patrick's Day, were not "toys" dutiable under paragraph 418 of Schedule N of the Tariff Act of 1897, carrying a 35% duty, as claimed by the importer, but were in truth "artificial or ornamental * * * flowers * * * of whatever material composed," carrying a 50% duty. In reaching this conclusion the Court said (page 533):—

> "These articles have no established commercial designation as toys. They are sold as shamrocks; and though they are usually to be obtained in toy shops, *not everything in a toy shop is a toy**—*e. g.*, baseballs and bats, firecrackers, bows and arrows, checker boards, playing cards, etc."

The learned Court of Appeals in finding for the respondents, refused to accept certain conclusions of the trial

*Italics in quotations throughout this Brief are ours, unless otherwise noted.

Judge not supported by evidence and commented upon these conclusions as follows (R. 93, 94):—

"Whether or not 'candy' in its technical sense, includes sweet chocolate and/or sweet milk chocolate, we do not deem it necessary to decide, in view of our conclusions, hereinafter set forth, with relation to the intention of Congress when the Revenue Acts of 1918 and 1921 were enacted.

"The court below said, with relation to the word 'candy' as it applies to sweet chocolate and sweet milk chocolate:

"'It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhestitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.'

"This statement of the court, which is made without any testimony to sustain it, and upon which the court very naturally relied in forming its opinion, it seems to us, may be without foundation in fact. It is entirely a matter of personal opinion, and we are not so sure that an actual investigation would sustain the conclusion. While some people might look upon it as candy, we feel that many would call it a food, and, in the absence of anything in the record tending to show that this is the popular opinion, we cannot sustain the judgment of the court on this theory.

"We are satisfied that the decision in this case rests primarily upon the action and intent of Congress in the enactment of the laws under which the tax was levied and collected, and this intent must necessarily be gathered from the prior laws in which different articles are classified for taxing purposes, and the proceedings preliminary to the enactment of the Revenue Acts of 1918 and 1921."

2. The consistent distinction between chocolate and candy to be found in internal revenue acts and tariff acts from 1792 to the present time is controlling in the case at bar, in the absence of any expression by Congress of an intention to the contrary.

Plaintiff's Exhibit 12, which was identified on page 46 of the Record and a copy of which is appended to this Brief, pp. 69 to 81, shows references by Congress to chocolate, *eo nomine*, as constantly distinguished from candy ("more fully called sugar candy" see Murray's Dictionary, p. 87 this Brief) in federal internal revenue and tariff statutes from the year 1792 to the present time. It was summarized by the Court below as follows (Record, pages 94-96):

> "In all the Tariff and Internal Revenue Acts of Congress from 1792 to 1913, candy, generally called 'sugar candy,' and chocolate and other products of the cacao bean, were separately classified. Chocolate has always, in the various acts, been referred to and taxed under an individual heading, indicating that Congress construed it to be a separate and distinct product for taxing purposes.
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> "The Revenue Act of 1918 was being considered by Congress during the World War, at a time when there was much agitation as to the food value of chocolate and, when it was asserted that cholocate was a concentrated food, used by the enlisted men of the United States Army and others. This may or may not have had its effect upon the members of Congress.
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> "The fact that Congress omitted to include chocolate in the 1918 act, taken in conjunction with the fact that it was specifically included in prior legislation, and was never before, either in congressional enactments or by executive regulation, included in the term 'candy,' is convincing proof of the intention of Congress to place no tax upon sweet chocolate or sweet milk chocolate in the 1918 Revenue Act.
>
> "The act of 1921 contains no reference to sweet

chocolate or sweet milk chocolate *eo nomine*, notwithstanding the fact that the regulations of the Commissioner, clasifying both as 'candy,' under the 1918 act and that the District Court decision in Massachusetts holding they were not taxable, was before the committee and Congress at the time of the consideration of the bill.

"It has been held in a number of cases that the intention of Congress, in revenue and import statutes, may be, and should be, determined by the manner in which the same articles were treated in former acts. Mr. J. Nelson, in delivering the opinion of the Supreme Court in the case of De Forest *et al. v.* Lawrence, 54 U. S. (13 How.) 274, 282, 14 L. Ed. 143, said:—

"'And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the denomination of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practised on at the custom-house.

"'It is but fair to presume, after having been treated by the law-makers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that, if

intended to be charged specifically, or by enumeration, the designation by which it was known to them would have been used, instead of the one known to trade and commerce, if that should be different.'

"In Reich *v.* Smyth, 80 U. S. (13 Wall.) 162, 165, 20 L. Ed. 566, it was held:—

"'Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are in *pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention.'

"The effect of the distinction recognized by Congress is very aptly referred to in the case of Arthur *v.* Stephani, 96 U. S. 125, 127, 128, 24 L. Ed. 771, wherein the court among other things, said:—

"'Should it be admitted, therefore, that chocolate is composed in part of the same substances that enter into the composition of ordinary confectionery, it must, nevertheless, stand upon the customs list as the distinct article so often described in the acts of Congress by its specific name. * * *

"'Contemporaneously and side by side, all the way down, the statutes provide for different rates of duty on the varieties of sugar and on confectionery, as well as on chocolate. Confectionery and chocolate are uniformly recognized as being different articles for the purpose of duties. * * *

"'It is quite evident that Congress has at all times intended to preserve the distinction between these articles, and that the circuit judge decided correctly when he held that chocolate, although in the form and

of the character, described was not dutiable as "confectionery" under the act of 1864.'

"This rule, so clearly stated, it appears to us, applies in full force to the facts presented in the case *sub judice.*"

In addition to the cases cited by the learned Court below, the following are helpful in considering this question:—

In re Schilling, et al., 53 Fed. 81, which was considered and approved by this Court in **U. S. v. Salambier, 170 U. S. 621,** is another case involving sweet chocolate. Shipman, Circuit Judge, in that case said:—

"This is an appeal by the United States from a decree of the circuit court for the southern district of New York, (see 48 Fed. Rep. 547,) which reversed the decision of the board of United States general appraisers upon the rate of duty properly to be assessed upon importations of sweetened chocolate, under the tariff act of October 1, 1890, (26 St. at Large, p. 567). The importations were made in October and December, 1890. 'Cocoa, crude,' or the cocoa bean, is upon the free list. Chocolate is the cocoa bean roasted, cracked, shelled, crushed, ground, and molded in cakes of about half a pound each. It contains no sugar, and is of general use in families. Sweetened chocolate, an article which is well known by that commercial name, is manufactured in the same way from the cocoa bean, but the paste is mixed with sugar, and it is principally used by confectioners to make chocolate confectionery. It is made in various sizes, from ten-pound cakes to wafers. A part of the importations in question was in ten-pound cakes, and the remainder was in small cakes of about two inches in length by one inch in width, and covered with papers of various colors. The article called in commerce 'prepared cocoa' is made from cocoa beans, which are roasted, shelled, and ground into a liquid condition. In this state it is put through a hydraulic

press, where the butter is pressed out, and it becomes a powder. Paragraph 238 of Schedule E of the act of October 1, 1890, places a duty of five cents per pound upon sugar candy and all confectionery, including chocolate confectionery, made wholly or in part of sugar of a specified value. Paragraph 239 places a duty of 50 per cent. *ad valorem* upon all other confectionery, including chocolate confectionery, not specially provided for in the act. The collector assessed a duty upon the importation of 50 per cent. *ad valorem*, under paragraph 239 and the similitude section, upon the ground that the merchandise assimilated in material, quality, and the use to which it may be applied to chocolate confectionery. The importers protested, claiming that the article was dutiable at two cents per pound, either under paragraph 318 or paragraph 319 of Schedule G of the same act. Paragraph 318 reads as follows: 'Chocolate, (other than chocolate confectionery, and chocolate commercially known as "sweetened chocolate,") two cents per pound.' Paragraph 319 is as follows: 'Cocoa, prepared or manufactured, not specially provided for in this act, two cents per pound.' The board of general appraisers, being of opinion that paragraph 318 was improperly punctuated, that the parenthesis should end at the word 'confectionery,' and that punctuation was no part of a statute, reversed the action of the collector, and adjudged that the article was dutiable at two cents per pound under paragraph 318. The circuit court reversed the decision of the board of appraisers, and adjudged that the article should have been classified for duty under paragraph 319.

"It cannot safely be contended that the importations were chocolate confectionery. The two articles differ from each other in fact and in commercial designation, and, while sweetened chocolate in the form of wafers or sticks may often be used as a confection, it is a different thing from chocolate confectionery, which is

*sweetened chocolate mixed with cream or fruits, or covered with sugar or other flavoring material.** Neither can the similitude section be resorted to if the article was enumerated in the existing tariff acts, either by specific or general designation. The question of interest in the case is whether the parenthetical punctuation of paragraph 318 can be so disregarded that the sentence can be construed as follows: 'Chocolate, (other than chocolate confectionery,) and chocolate commercially known as "sweetened chocolate," two cents per pound.' The legislative history of this paragraph seems to be that, as it passed the house of representatives, it was in the following form: 'Chocolate, other than chocolate confectionery, and chocolate commercially known as "sweetened chocolate," three cents per pound.' As it passed the senate it was in the following language: 'Chocolate, two cents per pound.' As reported to the two houses by the conference committees, and as passed by congress, the paragraph was in the form in which it is now printed. It was subsequently officially, and, no doubt, truthfully, stated by members of each branch of the committees of conference, that the clerks of the two committees, in preparing the report, made a mistake by ending the parenthesis in the wrong place. The error has not been corrected by congress, although the subject has received its attention.

"It is truly said that punctuation is no part of a statute, and that, therefore, punctuation can be changed in accordance with the obvious intent of the legislature; and it is also said that the inclosing a portion of a sentence in brackets is simply punctuation. A 'parenthesis' is defined to be 'an explanatory or qualifying clause, sentence, or paragraph inserted in another sentence, of in the course of a longer passage, without being grammatically connected with it.' Cent. Dict. It is used to limit, qualify, or restrict the mean-

*Italics ours.

ing of the sentence with which it is connected, and it may be designated by the use of commas, or by a dash, or by curved lines or brackets; but the use of curves or of brackets unmistakably shows that the clause thus included was supposed by the author or by the scrivener to limit or restrict a general meaning of the language with which it is connected, or to be of importance in explaining the meaning. The curved lines or brackets are, it is true, punctuation, but they are made with forethought, and for the purpose of clearness and definiteness. They designate much more distinctly than by the use of commas the character of the clause which is included. Apart from the declarations of the members of the conference committees upon the floor of congress, it could hardly be claimed that the intent of the statute plainly required a change in the punctuation. An inference could be drawn from the history of the statute before it reached the committees of conference, but, in view of the manifest limitation by the parenthesis, such an inference would not be controlling. Are, then, the declarations of the members of the committees sufficient to authorize a court to change the manifest meaning of a statute as it passed the legislative body and received the approval of the president, and to construe it in accordance with the intention of the committees? I think that such a judicial construction of a statute is akin to judicial legislation, which, as congress has refused to act upon the subject, it is well to avoid.

"The remaining question, whether sweetened chocolate can be classified under paragraph 319, is a more doubtful one. It is obvious that if the article was enumerated in the act of October 1, 1890, it must necessarily have been included in very general terms. All the articles which have been described are in fact manufactured from crude cocoa. The term 'cocoa, manufactured' is not a commercial term, and is broad enough to include the preparations of chocolate which

are not more specifically mentioned in the comprehensive statute of 1890, and within that paragraph the article in question finds an appropriate dutiable place.

"The decree of the circuit court is affirmed."

United States vs. McLaughlin and Freeman (No. 2601), 13 Court of Customs Appeals 404, is one of the last of a long line of customs decisions which followed the earlier cases. As the case is of importance in its discussion of the differences between sweet chocolate on the one hand and candy and confectionery on the other, this decision is also quoted at length as follows:—

"Before GRAHAM, Presiding Judge, and SMITH, BARBER, BLAND, and HATFIELD, Associate Judges.

"SMITH, Judge, delivered the opinion of the court:

"Triangular bars of sweetened chocolate, manufactured by *Societe Anonyme Chocolat Tobler* of Berne, Switzerland, and containing 37.75 per centum of chocolate, 0.60 per centum of almonds, 60 to 61 per centum of sugar and 1 to 2 per centum of honey, were classified by the collector at the port of Boston as confectionery, and assessed for duty at 40 per centum ad valorem, under paragraph 505 of the Tariff Act of 1922, which paragraph, in so far as pertinent, reads as follows:

"'PAR. 505. Sugar candy and *all confectionery* not specially provided for, 40 per centum ad valorem.'

"The importer protested that the merchandise was sweetened chocolate and claimed that it was therefore dutiable at 17½ per centum ad valorem under paragraph 775 of the Tariff Act of 1922, which reads as follows:

"'PAR. 775. Chocolate and cocoa, sweetened or unsweetened, powdered, or otherwise prepared, 17½ per *centum ad valorem*, but not less than 2 cents per pound; cacao butter, 25 per centum ad valorem.'

"The board sustained the protest and the Government appealed.

"There is no dispute as to the facts and on the agreed statement of counsel they must be taken as hereinbefore recited.

"Chocolate is a paste or cocoa made of cacao seeds, roasted or ground and often mixed with *sugar and some flavoring* ingredient. *Protest of Davis, et al.*, T. D. 18141. See "Chocolate"—New Standard Dictionary. From that definition it is apparent that the sweetening and flavoring of roasted and ground cacao seeds does not remove the article so manufactured from the category of chocolate.

"The word 'confectionery' is a generic term which comprises sweets, sweetmeats and comfits. See sweet, sweetmeat, comfit—New Standard Dictionary. It may be said therefore with entire truth that chocolate sweetened and flavored is a species or a kind of confectionery. That sweetened chocolate and chocolate confectionery are classes of chocolate and kinds of confectionery seems to have been recognized by paragraphs 318 and 238 of the act of 1890, which read as follows:

"'PAR. 318. Chocolate (other than chocolate confectionery and chocolate commercially known as sweetened chocolate), 2 cents per pound.

"PAR. 238. Sugar candy and all confectionery, *including chocolate confectionery, made wholly or in part of sugar* * * * 5 cents per pound.'

"In 1894 chocolate confectionery was taken out of the confectionery paragraph and transferred with sweetened chocolate to the chocolate paragraph, as appears from paragraphs 229 and 183 of the act of 1894, which paragraphs read as follows:

"'PAR. 229. Cocoa, prepared or manufactured * * * 2 cents per pound; *chocolate, sweetened, flavored, or other*, valued at 35 cents per pound or less, 2 cents per pound; valued at exceeding 35 cents per pound and *chocolate confectionery*, 35 per centum ad valorem.

"'PAR. 183. Sugar candy, and all confectionery, made wholly or in part of sugar, and on sugars after being refined, when tinctured, colored, or in any way adulterated, 35 per centum ad valorem; glucose, or grape sugar, 15 per centum ad valorem; saccharine, 25 per centum ad valorem.'

"That transfer was in strict accord with a legislative policy which ever since 1792 has recognized chocolate and confectionery as separate entities for tariff purposes. 1 Stat. p. 259; 3 Stats. p. 311; 4 Stats. p. 28; 5 Stats. p. 558; 9 Stats. p. 44; 12 Stats. p. 180, 189; 16 Stats. p. 262; 17 Stats. p. 231; Schedule B, act of March 3, 1883, pp. 331, 332, and 333; Rev. Stats. 468, 474, 475; act of 1890, pars. 238, 239, 303; act of 1894, par. 183, 218, 229; act of 1897, pars. 212, 218, 263; act of 1909, pars. 219, 274, 292; act of 1913, pars. 180, 217, 231; act of 1922, pars. 505, 775.

"In the case of *Arthur* vs. *Stephani*, the Supreme Court held that chocolate although *ordinarily sold as confectionery*, was nevertheless dutiable as chocolate inasmuch as it was more specifically provided for under that name. The court expressly stated that if the same substances entered into the composition of chocolate as were used in making ordinary confectionery, such chocolate would nevertheless be dutiable under that name and not as confectionery. *Arthur* vs. *Stephani*, 96 U. S. 125, 126, 127, 128.

"The importation is sweetened chocolate which contains 0.6 of 1 per centum by weight of crushed almonds. That small percentage of almonds was probably added for flavoring purposes, but whether it was or not, it can not be said the almonds were a distinctive feature of the product or that their introduction created a product which was not entitled to bear the name of sweetened chocolate. Six-tenths of 1 per centum by weight of almonds was negligible in the commodity and no more removed the commodity from

the common understanding of chocolate than would the addition of 0.6 of 1 per centum of vanilla extract or almond oil.

"We think that chocolate sweetened and flavored is confectionery and that it belongs to that class of confectionery denominated as chocolate by people in general. Taking into account the common meaning of the terms chocolate and confectionery, the fact that chocolate is a sweetmeat, the long maintained tariff distinction between confectionery and chocolate, the reasoning of the Supreme Court in *Arthur* vs. *Stephani, supra*, and the legislation which more specifically provides for the importation as chocolate than as confectionery, we are of the opinion that the merchandise here the subject of protest, is dutiable as sweetened chocolate at 17½ per centum ad valorem under paragraph 775.

"The judgment of the board is *affirmed.*"

Most, though by no means all, of the statutes appearing in respondents' Exhibit 12 are tariff acts, not internal revenue acts. It is well settled, however, that prior tariff acts may be considered in order to ascertain the intent of Congress in the use of words in internal revenue acts. An examination of the following cases will leave no doubt on this point.

In **Taylor vs. Treat, 153 Fed. 656 (1907),** which was affirmed by C. C. A. in 166 Fed. 1021, a suit was brought to recover excise taxes paid upon the sale of *"vermuth,"* the tax having been collected under the War Revenue Act of 1898 which taxed *"sparkling or other wines."*

In reaching the conclusion that "vermuth" was not "wine" within the meaning of the War Revenue Act of 1898, Judge Hough said (p. 657-658):—

"From the evidence of trade usage and nomenclature introduced, I find that there is no general trade consensus of opinion regarding this article. The

plaintiff's witnesses are sure that vermuth is not a wine, and not known or regarded as wine in the United States; but they are largely interested in the event of this suit. Those opposing them too frequently limit their statement that vermuth is a wine to their personal opinion to render it possible for me to believe that they are testifying to any general custom or uniform usage. But a considerable majority of all the witnesses agree that they buy and sell, advertise and drink, vermuth by that name alone. It is urged that this habit means no more than does the custom of alluding to sherry or port by those names without adding the word 'wine'; but this argument does not meet the proven method (above alluded to) of advertising vermuth in circulars and newspapers. I therefore find that the fluid has no other trade name or fame except as vermuth simpliciter, and is in the minds of American dealers and consumers an article of its own class, having no more mental relation to wine than chartreuse has to brandy."

And on pages 658-659 of his opinion Judge Hough lays great stress on the phraseology of Congress in the prior Tariff Acts and the distinct separation of the two things *eo nomine*:—

"*But in my opinion the plaintiffs are overwhelmingly entitled to judgment upon consideration of past tariff legislation on this subject.** Vermuth first appeared as a dutiable article in Act July 14, 1870, 16 Stat. 263, c. 255, and it is there classified with 'cordials, liqueurs, arrack, absinthe,' etc., in phraseology almost exactly borrowed from a similar catalogue (omitting vermuth) in Act Aug. 30, 1842, 45 Stat. 560, c. 270. In Act June 6, 1872, 17 Stat. 233, c. 315, section 4 provides: 'On vermuth the same duty as on wines of the same cost.' Here for the first time vermuth is separated

*Italics ours.

from cordials and liqueurs. In Act March 3, 1883, c. 121, § 1, Schedule H, par. 296, 22 Stat. 505 (U. S. Comp. St. 1901, p. 1654), there is provided on 'vermuth the same duty as on still wines.' In Act Oct. 1, 1890, c. 1244, § 1, Schedule H. 26 Stat. 589 (U. S. Comp. St. 1901, p. 1654), paragraph 336 lays a duty on 'still wines including ginger wine or ginger cordial and vermouth in casks, 50 cents per gallon,' and this phraseology was repeated in Act Aug. 27, 1894, c. 349, § 1, Schedule H, par. 244, 28 Stat. 589 (U. S. Comp. St. 1901, p. 1654). By the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule H. 30 Stat. 174 U. S. Comp. St. 1901, p. 1654), which was in force at the time of the passage of the war revenue act, it is provided in paragraph 296, that 'still wines including ginger wine or ginger cordial and vermouth' shall pay duty in proportion to the amount of alcohol therein contained, provided that any 'wine, ginger cordial or vermouth imported containing more than 24 per cent. of alcohol shall be classed as spirits and pay duty accordingly.' The reciprocity section (3) of the same act of 1897 speaks of 'still wines and vermouth.'

"As was done in Seeburger *vs.* Castro, 153 U. S. 32, 14 Sup. Ct. 766, 38 L. Ed. 624, it seems to me necessary to interpret the internal revenue act in harmony with the tariff legislation of the country. From the foregoing resume of tariff acts, it is, I think, clear that at no time has any revenue act of the United States regarded vermuth as a wine. It is in composition quite as much changed as the 'Bovrill wine,' which was refused classification with wine in United States *vs.* Shoemaker (C. C.) 84 Fed. 146, a case decided under the tariff act of 1890 (above quoted)."

In **Forbes Lithograph Co. vs. Worthington, 132 U. S. 655,** the question involved an interpretation of the Tariff Act of 1883 and Chief Justice Fuller, writing the

opinion for this Court, reviewed many of the previous revenue acts in which the words in question were used, and referred particularly (p. 660) to phraseology used by Congress in the War Revenue Act of June 30, 1864, 13 Stat L. 267 in support of his conclusion.

Reference to phraseology in a previous Internal Revenue Statute as an aid to determine the Congressional meaning of similar phraseology in a later Tariff Statute seemed so natural and proper to Chief Justice Fuller that he evidently did not think it necessary to comment on the practice.

In **Seeberger v. Castro, 153 U. S. 32,** this Court had under consideration certain phraseology and words used in the Tariff Act of 1883. This Act provided for a duty on "tobacco, *manufactured*, of all descriptions, and stem tobacco, not specially enumerated or provided for in this act, forty cents per pound" and the goods in question (invoiced as "cigar clippings") had been classified by the Collector under this section. The importer protested that his goods should have been classified as dutiable under another paragraph of the same Act reading as follows: "Tobacco, *un*manufactured, not specially enumerated or provided for in this act, thirty per centum *ad valorem,*" and brought this suit to recover the difference in duty paid. In holding that the article was "*un*manufactured tobacco" and dutiable as such, Mr. Justice White said (page 35):—

> "It seems to us, however, that both the meaning of the word 'manufactured' and the analogy of the internal revenue provisions require us to hold that these scraps are not manufactured tobacco."

and later (page 36):—

> "Resort to the provisions of the internal revenue laws regarding tobacco seems to us to strengthen rather than to militate against our conclusion"

(page 38):—

> "It follows, therefore, that if, under the rule of *pari materia*, we interpret the provision of the tariff

act of 1883 along with the provision of the internal revenue acts, thus quoted, we could not hold the scraps or waste to be a manufactured article, unless we said that that which is neither manufactured nor partially manufactured was yet a manufactured article."

In **Boston Sand and Gravel Company v. United States, 278 U. S. 41,** we have in a measure the converse of the argument in the present cases. In the Boston Gravel Case the plaintiff was contending that the meaning of the phrase "legal damages" (as used by Congress in an act permitting suits against the United States to recover for a collision) included interest because that was the plain, popular meaning of the phrase. In reply to this the Government cited several prior acts as legislative history to show that Congress by the use of the phrase "legal damages" did not intend to include interest. In dismissing the contention of the plaintiff in that case and adhering to the congressional intention as shown by the prior acts, Justice Holmes said (page 48):—

> "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists. *If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute.*"*

3. The structure and legislative history of the subdivision providing for a tax on candy in Section 900, Title IX, of the Acts of 1918 and 1921 indicate that Congress did not intend to impose a a tax on chocolate.

Except for numerals the language of the section in the two acts is the same and reads as follows:—

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* Italics ours.

Revenue Act of 1918, Title IX, Section 900, subdivision 9 (Act of Feb. 24, 1919, 40 Stat. L. 1057, 1122):

"(9) Candy, 5 per centum";

Revenue Act of 1921, Title IX, Section 900, subdivision 6 (Act of Nov. 23, 1921, 42 Stat. L. 227, 292):

"(6) Candy, 3 per centum";

Congress in these sections used the single word *candy* and did not use in either act the words sweet chocolate or sweet milk chocolate.

These sections providing for the tax on candy did not add to that word any general language inclusive in character to indicate an intent to include within the designation candy any commodities other than candy, though used for the same purpose and bearing the same general character.

The fact that Congress intended to limit the tax to candy alone and not to include another commodity of a similar nature or use is evidenced by the fact that Congress, when providing for a tax in other sub-divisions of this same Section 900, did use general language such as may be found in sub-divisions (1), (2), (3), (5), (6), (14), (19) and (20).

Title IX Section 900, Revenue Act of 1918:—

"(1) Automobile trucks and automobile wagons, (including tires, inner tubes, *parts, and accessories therefor,* sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motorcycles, (including tires, inner tubes, *parts, and accessories therefor,* sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, *parts, or accessories,* for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

"(5) Tennis rackets, nets * * * skates, snowshoes * * * baseballs, fishing rods * * *

checker boards * * * games * * * *and all similar articles commonly or commercially known as sporting goods,* ten per centum;"

"(6) Chewing gum *or substitutes therefor,* three per centum."

"(14) Thermos and thermostatic bottles, carafes, jugs, *or other thermostatic containers,* five per centum."

"(19) Articles made of fur on the hide or pelt *or of which any such fur is the component material of chief value,* ten per centum."

"(20) Yachts and motor boats * * * *and pleasure boats and pleasure canoes* * * * ten per centum."

In the Revenue Act of 1921, Congress again used the single word *candy* (sub-division (6) of Section 900, Title IX), although in other sub-divisions of the same section inclusive words and phrases are used to extend the tax to articles similar to, or adapted to similar use, or having similar characteristics to, the articles taxed *eo nomine* in such other sub-divisions.

In Section III of petitioner's Brief (pp. 24-28) there are two points, *inter alia,* which seem clearly without sufficient foundation to justify the distinctions attempted to be made by the Government between the position taken by the respondents that "candy" was not intended by Congress to include "sweet chocolate" and the position taken by the Government that "candy" does include "sweet chocolate." The argument in the Brief is to the effect that there is no weight to be given to the classification by Congress in the earlier Tariff Acts and Internal Revenue Statutes between "candy" on the one hand and "chocolate" on the other, because in the earlier statutes the phrase designating one classification is "sugar candy, and all confectionery not specially provided for in this section.". It is urged that if in these statutes "chocolate" had not been otherwise speci-

fied for taxation, it would have been included under that section. This may be fully conceded without varying in any degree the position taken by these respondents in reference to the value which these statutes have to show a clear distinction in the mind of Congress between "chocolate" on the one hand and "candy" or "sugar candy" on the other. The duty to be levied in the absence of a special classification for "chocolate" under the section providing a duty on "sugar candy, and all confectionery not specially provided for in this section," would not be levied because "chocolate" is "sugar candy" but because "chocolate" is a confectionery as is also "sugar candy." The fact that "chocolate" and "candy" are both commodities which, with many others may properly be classed as confectionery, does not make "chocolate" "candy" or make "candy" "chocolate." None of the decisions referred to by the Government and none of the Acts of Congress over the long period of years in which the Tariff and Revenue Acts have been passed, give to the word "candy" the class status of the word "confectionery" so that it may lawfully be interpreted to include all commodities which are properly classed under the designation of "confectionery."

The argument in this section of the Government's brief also insists that Congress intended solely to tax "luxuries" by the excise taxes in the Revenue Acts of 1918 and 1921 under consideration, and that because "candy" was taxed and candy made a luxury, "chocolate," if eaten in preference to "candy," becomes a luxury to the consumer, and therefore was intended to be included under the term "candy" and therefore becomes a luxury for the purpose of taxation. A reading of the statute weakens the force of this argument even though there may be foundation, in the report of the Committee, for the thought that such was the general purpose of the Act. That "automobile trucks and parts"; "automobile wagons"; "motor-cycles"; "tires or accessories"; "firearms, shells and cartridges"; "hunting and bowie knives"; "dirk knives, daggers and brass or metallic knuckles"; "automatic slot vending machines";

"toilet soap and toilet soap powders," were articles solely of luxury and thereby taxed for that purpose, would not be universally conceded. It is suggested that had the Circuit Court of Appeals in the **Baker Case** analyzed the Act more carefully it might have taken judicial knowledge of the fact that "toilet soap" was somewhat of a necessity even to the citizens of Massachusetts and not merely a luxury such as "candy" is claimed to be.

The legislative history of the war excise taxes shows constant effort on the part of manufacturers of many articles proposed for taxation to induce Congress to eliminate the differential which the tax upon such articles would create in favor of a competing article not included in the proposed legislation.

Section 900 of the Revenue Acts of 1918 and 1921 had a similar history, and throughout its formulative period the candy manufacturers, through their National Confectioners' Association, constantly endeavored to induce Congress to tax articles in competition with candy, and particularly to tax sweet chocolate and sweet milk chocolate.

The evidence in the case at bar shows the extent to which such efforts were directed before the Ways and Means Committee of the House of Representatives and before the Finance Committee of the Senate during the time when the Revenue Act of 1921 was being drafted.

The hearings before these Committees were held upon the proposed bill which carried under Title IX, Section 900, sub-division (6), *candy* as the product to be taxed. There was no provision for a tax upon sweet chocolate or sweet milk chocolate. The representatives of the candy manufacturers specifically referred in their argument against taxing candy alone to the fact that the United States District Court of Massachusetts had held that sweet chocolate and sweet milk chocolate were not candy and therefore not taxed. They impressed upon the members of the House and Senate Committees the necessity for using inclusive language to extend the tax upon candy to sweet chocolate and sweet milk chocolate in order that the com-

petition between these products might be equalized. The fact that both Houses of Congress were aware of the limit of the tax resulting from the use of the word candy is shown by the statements of the members of the Committees in charge of the bill in discussing the scope of the section in question both at the hearings and upon the floor of Congress:—

> Congressman Frear of the House Committee clearly showed that sweet chocolate and sweet milk chocolate were not within the tax on candy because in referring to "small sweet chocolate bars," he asked (Record, page 41), *"Would it help matters if we taxed them?"*

> Statement of Senator LaFollette (of the Senate Finance Committee) on the floor of Senate (Record, page 42): *"Sweet chocolate is not taxed as candy at all. It is not candy and is not so taxed."*

> And Senator McLean on the floor of the Senate (Record, page 43): "For instance, *sweet chocolate is not taxed at all.* * * *"

Surely, if there were any doubt concerning the scope and meaning of the word candy as used by Congress, it would be resolved by the fact that *although Congress was expressly advised of the judicial construction of the word by the Federal court, no change or addition was made in the Act of 1921.*

In **Hecht v. Malley, 265 U. S. 144,** the question was whether the Trustees under a certain "Massachusetts Trust" were subject to the special excise tax imposed upon certain "associations" by the Revenue Act of 1916. This act imposed a special excise tax upon "every corporation, joint

stock company or association, now or hereafter *organized in the United States* for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any state or territory."

The Corporation Tax Law of 1909 used the same phraseology except that the words "in the United States" were not included after the word "organized," and in the case of Eliot *v.* Freeman, 220 U. S. 178, 185 (1911), this Court held that the phrase "now or hereafter organized for profit" as used in the 1909 Act did not include a Massachusetts Trust.

In holding that such a Massachusetts Trust was not within the meaning of the 1916 Act, Mr. Justice Sanford said, page 153:—

> "The words 'organized in the United States' have no different effect, as applied to domestic corporations, joint-stock companies and associations, from the word 'organized' as used in the Act of 1909, and in no wise remove the ensuing general limitation that they must be such as are 'organized under the laws of the United States, or any State or Territory.'
>
> "And since these limiting words, when used in the Act of 1909, had been held by this Court, in Eliot *vs.* Freeman, to show the intention of Congress to embrace within the statute only such corporations and joint-stock associations as 'are organized under some statute, or derive from that source some quality or benefit not existing at the common law,' they must be given the same meaning and effect when used in the Act of 1916. In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment. Sessions *vs.* Romadka, 145 U. S. 29, 43; Latimer *vs.* United States, 223 U. S. 501, 504."

* * * * * * *

"We conclude that as the trusts involved in these four cases are not organized under any statute and derive from such source no quality or benefit, they are not within the terms of the excise tax provision of the Act of 1916."

In **Latimer vs. United States, 223 U. S. 501, 504,** it was held that Congress, in using the words "unmanufactured tobacco" in the Tariff Act of 1897 (30 Stat. L. 194, 169), paragraph 215, must be deemed to have adopted the construction given by the Court to those words as used in an earlier tariff act.

Justice Lamar on pages 503-4 in this case said:—

"There has been some difference of opinion as to the proper classification of scrap tobacco under the various tariff acts. In United States *vs.* Schroeder. 93 Fed. Rep. 448, a higher grade of scrap was held to be 'waste' within the meaning of the tariff act of 1890. In Seeberger *vs.* Castro, 153 U. S. 32, it was decided that the clippings from the ends of cigars were dutiable as unmanufactured tobacco under the tariff act of 1883.

"The plaintiff claims that this decision has no application here, because it related to clippings which were of a higher grade than scrap, and for the further reason that, as the importer there made no claim that it should be taxed as waste, the court did not pass on that question. But it did definitely decide that such material, by whatever name called, was 'unmanufactured tobacco.'

"The words, having received such a construction under the act of 1883, must be given the same meaning when used in the tariff act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court."

* * * "The judgment is therefore affirmed."

In the cases at bar Congress used the word candy in the 1918 Act with knowledge that this Court in Arthur *v.* Stephani (*supra*) had definitely decided that (for the purpose of the statutes there considered) *sweet chocolate was chocolate and was not dutiable as confectionery.* Congress used the same word candy in the 1921 Act not only with that decision before it but also with definite knowledge of the decision of Judge Morton in the Baker case, holding that *sweet chocolate and sweet milk chocolate were not candy.*

The learned Court below, on the authority of the decisions of this Court gave weight to these facts in arriving at the intent of Congress (R. 97):—

> "The deliberations of the committees and the facts produced before them when considering the bill appear to be legal evidence and should be given its due weight. Holy Trinity Church *v.* United States, 143 U. S. 457, 464, 12 S. Ct. 511, 36 L. Ed. 226; Binns *v.* United States, 194 U. S. 486, 495, 24 S. Ct. 816, 48 L. Ed. 1087.
>
> "In spite of the knowledge of the Representatives and Senators in Congress, no definite tax was levied on sweet chocolate or sweet milk chocolate; and, from the manner in which Congress has always treated this subject, and in view of the special knowledge it had prior to the passage of the 1921 act, we are satisfied that Congress did not intend to include either of these products in the Revenue Acts of 1918 or 1921."

This rule has been approved by this Court as recently as **Graham v. Goodcell, U. S. , 75 L. ed. 242,** where Mr. Chief Justice Hughes said (p. 251):—

> "The view that the word 'stay' was intended to embrace this voluntary delay is supported by the statements in the reports of the committees in the House of Representatives and the Senate."

4. Article 22, of Treasury Regulations 47 under the Act of 1918, and Article 19, of Treasury Regulations 47 under the Act of 1921, are both invalid.

The Government, in the Trial Court and in the Circuit Court of Appeals, relied upon the regulations promulgated by the Commissioner of Internal Revenue to justify the taxes imposed upon the chocolate and sweet milk chocolate sold by the respondents during the years in question, and in the brief in support of the writs for certiorari, and now on the merits, it is contended that these regulations are valid. Their validity is not asserted on the ground that they are reasonable but rather on the ground that, having been promulgated to enforce the provisions of the Revenue Acts of 1918 and 1921 and having been continued in force with the amendments that are shown in the record, they became a part of the Revenue Acts in question, and that the applicable decisions of this Court require that action under them be sustained.

The consideration given to these questions by the learned Court below resulted in the conclusion expressed by Judge Avis (R. p. 97):—

> "In both the Revenue Acts of 1918 (40 Stat. 1143, §1309) and 1921 (42 Stat. 309, §1303) the authority of the Commissioner to make needful rules and regulations, with the approval of the Secretary, is in the following language:
>
> " 'That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act.'
>
> "It will be noted in this statute that it provides for 'rules and regulations' which shall be 'for the enforcement of the provisions of this act.'
>
> "The question involved on this phase of the case rests somewhat upon a construction of the statutes. Certainly the Commissioner and/or the Secretary have no au-

thority to make law; this power rests in Congress, unless some ambiguity exists, and the regulation is reasonably in accordance with the statute.

"In the case of Morrill *v.* Jones, 106 U. S. 466, 467, 1 S. Ct. 423, 424, 27 L. Ed. 267, Chief Justice Waite said: 'The secretary of the treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what congress has enacted.' See, also, United States *v.* United Verde Copper Co., 196 U. S. 207, 25 S. Ct. 222, 49 L. Ed. 449.

"A regulation of an executive department construing a statute is given great weight, and is strongly persuasive, and has the force and effect of law, if made in pursuance of statutory authority, but Congress alone has the power to lay taxes. See Burk-Waggoner Oil Ass'n *v.* Hopkins (N. D. Tex.) 296 F. 492, and cases cited.

"Taking into consideration, the reading of the statute, the prior attitude of Congress with relation to imposition of taxes on chocolate, and the fact that the matter was considered and discussed in committee and on the floor of the Senate before the passage of the act of 1921, to the extent that the actual regulation defining 'candy,' afterward promulgated by the Commissioner and the Secretary, was submitted to the committee considering the bill, we are convinced that there was no ambiguity in the statutes which permitted or authorized the regulations imposing the tax on sweet chocolate or sweet milk chocolate, in the manner or to the extent contended for by the defendant appellee.

"We therefore hold that the imposition of the tax upon the product of appellants was not authorized by the regulation of the Commissioner, approved by the Secretary."

The Trial Court, Kirkpatrick, J., although finding for the Government, for the reasons stated in the opinion (Rec.

20-26), made no attempt to justify the judgment by the fact that the taxes in question were lawfully exacted by reason of the provisions of the treasury regulations, but on the contrary condemned the regulations in language which is as convincing as that of the Circuit Court of Appeals. In commenting upon the regulations so earnestly argued for by the Government, Judge Kirkpatrick says (Rec. p. 26):—

> "I have given no weight to the Treasury Regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction."

It therefore appears from the finding of these two Courts that the regulations so earnestly supported by the Government have been conclusively eliminated by them from these cases as the authority upon which to exact the taxes in dispute. The fact that this finding has been concurred in by both Courts below would seem to justify the thought that it will not be disturbed by this Court.

The power granted to the Commissioner of Internal Revenue to make regulations under these revenue acts is found only in the following sections:—

Section 1308 of Revenue Act of 1918, 40 Stat. L. 1057, 1143, reads as follows:—

> "Section 1308. That the Commissioner with the approval of the Secretary is hereby authorized to make all needful rules and regulations *for the enforcement* of the provisions of this Act."

Section 1303 of the Revenue Act of 1921, 42 Stat. L. 227, 309, reads as follows:—

> "Section 1303. That the Commissioner with the approval of the Secretary is hereby authorized to make all needful rules and regulations *for the enforcement* of the provisions of this Act."

The language used by Congress does not delegate to the Commissioner of Internal Revenue or to the Secretary of the Treasury the power to legislate nor are they given the power to enlarge, by definition or otherwise, the scope of the words used by Congress.

Article 22 (originally issued May 1, 1919; issued in revised form Dec. 27, 1920) and Article 19 of Regulations 47, upon which the government relies for authority to levy and collect the taxes involved in these suits, are set forth in full in Columns 1, 3 and 4 respectively in an exhibit attached to this brief (pages 82 to 85).

These Articles purport to define candy, but in fact they are merely a classification as candy of a number of products sometimes sold by confectioners. Sweet chocolate and sweet milk chocolate, have a well defined identity other than candy and obviously are included within the classification without any justification in fact or in law.

The lack of confidence of the Secretary of the Treasury in his original Regulation is shown by the language which he used in presenting it to Congress when the Revenue Act of 1921 was under consideration. In his Letter of Transmittal which was sent to the Chairman of the House Committee on Nov. 3, 1919, with his "Notes on the Revenue Act of 1918" (see Plaintiff's Exhibit No. 11, Record, page 44) the Secretary said:—

> "This material is not in the form of recommendations by the department, as a decision has not yet been reached with respect to all the suggestions; and, indeed, the department entertains serious doubt as to the advisability of the adoption of some of them."

Among these "notes" the following is found:—

"NOTES OF THE REVENUE ACT OF 1918.

"Section 900 (9). Tax on candy.

"This subdivision imposes a tax on candy sold by the manufacturer, producer, or importer.

"It has been suggested that the term 'candy' should be defined.

"The following definition of the term 'candy' is suggested:

" 'Strike out subdivision (9) and insert:

"Candy, 5 per centum. *Candy within the meaning of this subdivision—*

"(a) *Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams; nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glace or candied fruis and nuts not specified in paragraph* (b) *of this subdivision, pop corn and other cereals or cereal products not specified in paragraph* (b) *of this subdivision, mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, sweetened licorice not taxed as cough drops under section 907 sweet chocolate and sweet milk chocolate whether plain or mixed with fruit or nuts; and all similar articles however designated;*

"(b) *Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, nor glace or candied fruits purchased for and used in the manufacture of food products, such as ice cream, cakes, and pastries.*"

It will be seen at a glance by turning to pages 82 to 85 inclusive of this brief (where the above suggestion of the Secretary is set up in parallel columns with the various forms of the Regulation in question) that the suggested definition

is almost *verbatim* that of the Regulation, yet nowhere in his letter or in his "Notes" does the Secretary furnish Congress with a hint of this fact. At all events, Congress, when it came to enact the Revenue Act of 1921, paid no attention to the "suggestion" of the Secretary, though as previously shown, it had knowledge of the decision of the United States District Court of Massachusetts (subsequently reversed in Malley *v.* Walter Baker Company, 281 Fed. 41, *infra*) to the effect that sweet chocolate and sweet milk chocolate are not candy, and consequently are not taxable as candy,—which decision was, at that time, unappealed from.

In the case of **Cracker Jack Company v. United States, 67 C. Cls. 89,** the regulations under consideration here were considered by the Court of Claims, and the opinion by Graham, *J.*, explains the origin of them and approves of them in their application to "Cracker Jack," held to be a candy in fact by reason of its manufacture from boiled sugar, in the manner described in the opinion. The language of the opinion is interesting, particularly in its showing that the provisions of the regulation here under consideration were not those resulting from the exercise of a reasonable administrative discretion on the part of the Treasury Department, but were the adoption of a definition urged upon the Department by the National Confectioners Association for the purpose, as stated by the representatives of these *candy* manufacturers before the Committees of Congress, of extending the tax imposed upon candy to certain articles including sweet chocolate and sweet milk chocolate, which would be exempt from this taxation because of the limited language of the Statute. In that case Graham, *J.*, says (p. 96) :—

> "It is also true that the findings of administrative officers and their practice are presumed to be based upon conclusions which are the result of investigation. Congress having used the word 'candy' without definition, it becomes necessary as an administrative act for

the Commissioner of Internal Revenue to define it by regulations for the information of taxpayers. The representatives of the manufacturers of candies, confections, sweetmeats, etc., were before Congress prior to the passage of these acts and were heard. The clerk of the House Ways and Means Committee, where these hearings took place, was a Mr. Walker, who at the time of the making of the regulations (see Findings X and XI) defining 'candy' was Deputy Commissioner of Internal Revenue, and by reason of his service as clerk was generally acquainted with what took place before the committee. The Deputy Commissioner of Internal Revenue and the manufacturers had a conference, and the representative of the National Confectioners Association, which embraced about four-fifths of the manufacturers of candies, candied fruits, nuts, pop corn, and similar articles had conferences with Mr. Walker before, and was present at, the hearings where the Commissioner of Internal Revenue was represented by Mr. Walker, deputy commissioner, the Solicitor of Internal Revenue, and one of the attorneys in his office. After the hearing the regulations (Findings X and XI) embodying the definition of 'candy' were promulgated by the commissioner. This definition is in substantial conformity with a definition suggested at the hearing by the National Confectioners Association. So that it clearly appears that this definition was not reached until after careful hearing and consideration, which must necessarily increase the presumption as to its reasonableness. That it is not in conflict with the express language of the acts is clear. But, more than this, a reading of both acts, and particularly section 900 of each, above mentioned, shows that the purpose of these sections was to tax luxuries, that is, to tax articles the use or consumption of which would ordinarily be considered indulgence in a luxury rather than a necessary article of food.

"A description of the product and the process of its manufacture we think shows that its consumption is indulgence in a luxury. The plaintiff's product, known as Cracker Jack, consisted of pop corn mixed with a syrup, which after cooking crystallized. The syrup consisted of dissolved sugar, corn syrup, and molasses. It was cooked for a short time, and to it, while cooling, was added a small quantity of peanuts. After further cooking, this mixture of syrup and peanuts was poured into a tub containing pop corn and stirred and the mixture placed in reels where it was allowed to cool. The process of mixing and cooling was of such character that after cooling each kernel of pop corn was separated from the mass, but as separated had a coating of crystallized syrup. It was then automatically boxed in an air and moisture tight wax paper carton and in this form sold. The proportions of the mixture were as follows: Popped corn, 32.9%; peanuts, 8.3%; sugar, corn syrup, and molasses, 58.8%. It will be seen that this product is of the same kind and class as peanut brittle, candied fruit, and similar articles."

To the same effect is the decision of the same Court in **Shotwell Manufacturing Co. v. U. S., 67 C. Cls. 152.**

The application of the tax to "Cracker Jack" was due to the use by Congress of the word candy which obviously includes this confection made with boiled sugar, without regard to the regulation of the Treasury Department instigated and imposed upon the Department, substantially *verbatim*, by the candy manufacturers, who had failed in their efforts to secure its inclusion as a statutory definition of candy in the Act itself.

The decisions of **Brewster v. Gage, 280 U. S. 327; Universal Battery Company v. U. S., 281 U. S. 580,** and **Fawcus Machine Company v. U. S., 75 L. ed. 171,** used by the Government to justify its reliance upon the

provisions of the regulations here under consideration, as stated by Mr. Justice Roberts in the last named case, present a rule with which the respondents are in full accord (p. 173):

> "The regulations were made pursuant to express authority (see §1309 of the Revenue Act of 1918). They are valid unless unreasonable or inconsistent with the statute. United States *v.* Grimaud, 220 U. S. 506, 517, 518; International R. Co. *v.* Davidson, 257 U. S. 506, 514. They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons. United States *v.* Moore, 95 U. S. 760, 763; Brewster *v.* Gage, 280 U. S. 327, 336."

This rule, however, has no application to the cases now before this Court, not only for the other reasons hereinafter presented, but because of the reason given by Mr. Justice Roberts for denying its application in the case of **Poe v. Seaborn, 282 U. S. 101,** in which case, as in these, the language of the statute was too clear to permit an enlargement of its meaning by departmental regulations.

In **Crooks v. Harrelson, 282 U. S. 55,** Mr. Justice Sutherland said (p. 61):—

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In United States *v.* Merriam, 263 U. S. 179, 187, 188, 68 L. ed. 240, 244, 29 A. L. R. 1547, 44 S. Ct. 69, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord Cairns in Partington *v.* Atty. Gen.,

L. R. 4 H. L. 100, 122, that if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The Regulations did not construe the statute for the purpose of enforcement, but attempted to enlarge it, so that what the National Confectioners' Association and the Commissioner thought had been unfairly omitted, might be included within its scope. To supply omissions transcends the administrative function.

Lynch vs. Tilden Company, 265 U. S. 315, involved the validity of a Treasury Regulation purporting to define "adulterated butter" as used in the Act of May 9, 1902 (13 Stat. L. 193). Section 4 of that Act provided that adulterated butter should include, *inter alia*:—

> "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream."

In 1907 the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated Regulations No. 9, which contain the following:—

> "Adulterated Butter Defined: The definition of adulterated butter as contained in the act of May 9, 1902, embraces butter in the manufacture of which any process or material is used whereby the product is made to 'contain abnormal quantities of water, milk or cream,' but the normal content of moisture

permissible is not fixed by the act. This being the case it becomes necessary to adopt a standard for moisture in butter, which shall in effect represent the normal quantity. It is therefore held that butter having 16 per cent. or more of moisture contains an abnormal quantity and is classed as adulterated butter."

Certain butter, upon which Tilden Company had paid a tax, and which concededly contained more than 16% moisture was seized by the Commissioner of Internal Revenue as "adulterated" and this suit was brought to recover the tax paid.

In declaring the Treasury Regulation invalid, this Court, speaking through Mr. Justice Butler, said (pages 320-322):

"The act does not prescribe the amount of moisture permissible or fix any rule or criterion by which to determine the amount that is deemed 'abnormal' or that lawfully may be absorbed and incorporated.

"The regulation makes water content the sole test of adulteration, without regard to other provisions of the act. In support of its validity, it is said that, in declaring 16 per cent. of moisture in butter is abnormal, the regulation does no more than to establish a scientific fact. But it goes beyond that, and declares such butter to be adulterated. It omits essential elements of the statutory definition: namely, the use of a process or material in the manufacture of the butter, and the causing of absorption,—*i. e.*, the incorporation or taking in from the outside,—of abnormal quantities of moisture."

* * * "The regulation prescribes a standard which Congress has not authorized the Commissioner or the Secretary to fix. It sets up a definition of adulterated butter which conflicts with that contained in the act.

The two cannot be read in harmony. If given effect, the regulation would eliminate from the definition of adulterated butter the conditions specified in the act and strike out words and phrases and substitute other for them. In effect, it would depart from and put aside the statutory definition. In some of the lower courts the regulation has been held invalid *United States* vs. *11,150 Pounds of Butter*, 195 Fed. 657, affirming 188 Fed. 157; *Baldwin Co-operative Creamery Association* vs. *Williams*, 233 Fed. 607; *Henningsen Produce Co.* vs. *Whaley*, 238 Fed. 650. But in *Coopersville Co-operative Creamery Co.* vs. *Lemon*, 163 Fed. 145, it was held valid. We think that decision fails to take into account and give proper weight to the conflict between the act and the regulation. See *Field* vs. *Clark*, 143 U. S. 649; *United States* vs. *Eaton*, 144 U. S. 677; In re *Kollock*, 165 U. S. 526; *Buttfield* vs. *Stranahan*, 192 U. S. 470; *Williamson* vs. *United States*, 207 U. S. 425; *United States* vs. *Grimaud*, 220 U. S. 506. It must be held that the regulation is invalid."

In **U. S. vs. United Verde Copper Company, 196 U. S. 207 (1905)**, it was held that the word "domestic" as used in the act of June 3, 1878, 20 Stat. 88, c. 150, permitting the use of timber on public lands for "building, agricultural, mining and other *domestic* purposes," is not to be construed as relating solely to household purposes but should be interpreted to include industries "local" to the place where the timber is as distinguished from "foreign" industries.

On page 215 Mr. Justice McKenna said in this case:—

"But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. Smelting may be a separate industry from mining,

but that does not deprive it of the license given by the statute. As we have already said, the general clause, 'other domestic purposes' is as much a grant of permission to the industries designated by it to use timber as though they had been especially enumerated, and their rights are as inviolable as the rights of the industries which are enumerated. The industries meant by the general clause may receive indeed limitation from those enumerated; in other words, be limited to the conditions existing in the mining States and Territories when the statute was enacted, but there can be no doubt that smelting has such relation. *If rule 7 [illegible]valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary.** Congress has selected the industries to which its license is given, and has entrusted to the Secretary the power to regulate the exercise of the license, not to take it away. There is, undoubtedly, ambiguity in the words expressing that power, but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them or invest the Secretary of the Interior with the power of legislation."

In **Waite vs. Macy, 246 U. S. 606,** an action in equity was brought by an importer of tea against the Board of General Appraisers (acting under the Secretary of the Treasury) to restrain the enforcement of a Treasury regulation which fixed an arbitrary test for the determination of the purity and quality of tea.

The Treasury regulation was promulgated under the Act of 1897, as amended by the Act of 1908, and provided for the establishment of standards "of purity, quality and

*Italics ours

fitness for consumption, of all kinds of tea imported" and provided that the Secretary of the Treasury is given power to enforce the provisions of the Act by appropriate regulations. It was shown that while the tea in question could not comply with the test laid down in the Treasury regulation, it nevertheless was a very high grade tea worth nearly four times as much as the standard and the sole cause for rejecting it was the presence of a small percentage of Prussian blue which was not contended to be deleterious.

In holding the regulation invalid and sustaining the injunction, Mr. Justice Holmes said, at page 608:—

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption. Morrill *vs.* Jones, 106 U. S. 466. United States *vs.* United Verde Copper Co., 196 U. S. 207, 215. United States *vs.* George, 228 U. S. 14, 21."

* * * * * * *

> "We are brought then to the merits, and we are of opinion that the rule cannot be sustained, notwithstanding that since a former board refused to follow it as it then stood, there has been added clauses intended to save it as a chemical analysis. The regulation makes the presence of any coloring matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality and fitness for consumption, words repeated over and over again in the act. It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much. All extraneous substances are impurities, and the presence of any may be detected in any way

found efficient. But one such substance cannot be picked out and accorded supremacy in evil by an absolute rule irrespective of any harm that it may do. We go one step further and add that in view of the facts as to the standard and this tea, the presence of the Prussian blue affords no adequate ground for keeping the tea out.

"The Secretary and the board must keep within the statute, Merritt *vs.* Welsh, 104 U. S. 694, which goes to their jurisdiction, see Interstate Commerce Commission *vs.* NorthernPacific Ry. Co., 216 U. S. 538. 544."

In **Iselin vs. United States, 270 U. S. 245,** which involved another Section of the 1918 Act, it was held that:—

Par. 3 of §800 (*a*) of Revenue Act of 1918, laying taxes on theater and opera tickets sold at newstands, hotels, etc., for more than the "established price" at the ticket office of the theater or opera house, was inapplicable to a sale by a stockholder of box tickets, issued as an incident of his investment in an opera house company, which were not sold at the box-office and for which there was no established price. P. 247.

A statute imposing taxes with particularity, and in plain, unambiguous language, cannot be enlarged by construction to cover other cases omitted through presumable inadvertence of the legislature. P. 250.

An administrative practice which enlarges the scope of an unambiguous statute, and which is neither uniform, general, nor long continued, can not be given legal force or effect, nor be accepted as a reason why subsequent reenactment of the statute without change should be taken as a legislative interpretation of its original meaning as justifying such practice. P. 251.

On pages 250 and 251, Mr. Justice Brandeis in this case said:—

"It may be assumed that Congress did not purpose to exempt from taxation this class of tickets. But the Act contains no provision referring to tickets of the character here involved; and there is no general provision in the Act under which classes of tickets not enumerated are subjected to a tax. Congress undertook to accomplish its purpose by dealing specifically, and in some respects differently, with different classes of tickets and with tickets of any one class under different situations. The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax, were specified, preclude an extension of any provision by implication to any other subject. The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. Compare United States *vs.* Weitzel, 246 U. S. 533, 543; Peoria & Pekin Union Ry. Co. *vs.* United States, 263 U. S. 528, 534, 535.

"The Government calls attention to the fact that, as early as October 24, 1919, the Commissioner of Internal Revenue made the ruling pursuant to which the tax here in question was assessed; that on March 22, 1920, the Attorney General sustained that ruling; that the provisions here in question were re-enacted without substantial change in the Revenue Act of 1921, Act of November 23, 1921, §800 (*a*), c. 136, 42 Stat. 227, and the Revenue Act of 1924, Act of June 2, 1924, §500 (*a*), c. 234, 43 Stat. 253; and that the administrative practice adopted in 1919 has been stedfastly pursued. It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither uniform, general, nor long-continued; neither is the statute ambiguous. Such departmental

construction cannot be given the force and effect of law. Compare United States *vs.* Falk & Brother, 204 U. S. 143; National Lead Co. *vs.* United States, 252 U. S. 140, 146."

Morrill vs. Jones, 106 U. S. 466, involved the validity of a Treasury regulation promulgated under Section 2505 of the Revised Statutes which provides among other things that "animals, alive, *specifically imported for breeding purposes* from beyond the seas, shall be admitted free (of duty), upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he may prescribe."

Article 383 of the Treasury Customs Regulations provided that before a collector admits such animals free, he must among other things "be satisfied that the animals are of superior stock adapted to improving the breed in the United States."

Jones imported certain animals which he claimed should be admitted free as they were "specifically imported for breeding purposes." The collector, nevertheless, demanded duties because he was not satisfied that the animals were "of superior stock." Duties were paid under protest and this suit was brought to recover money so paid. The matter was permitted to go to the jury with instructions from the court that the Secretary of the Treasury had no power to prescribe what classes of animals imported for breeding purposes should be admitted free of duty, and the only question left for the jury was whether or not these particular animals had been specifically imported for breeding purposes. Verdict for the plaintiff.

In sustaining the lower court and holding that the Secretary could not lawfully make such a regulation, Chief Justice Waite said (page 467):—

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is

to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

In this connection the case of **Funsten Company v. U. S., 65 U. S. C. Cls. 292,** is precisely in point, as the Regulations there considered were those now before this Court. Chief Justice Campbell, delivering the opinion of the court said:—

"The commissioner ruled that the dates sold in the larger containers of seven and fifteen pounds were not taxable as candy and the Government concedes this is correct. The Government also concedes that the use of the sugar for the purpose mentioned does not make the product candy but insists that the dates packed in the smaller containers are candy within the meaning of the taxing act. The reasoning that makes the line of separation between dates and candy lie in the size of the containers is not easy to follow. *If an article in a small box be candy it would seem that more of the same article in a large box would also be candy.* * * * Candy is one of the confectionaries, but all confections are not candy. The sale of the dates, prepared

as shown here, in small containers, if conceded to be sold as confections does not constitute a sale of candy. The tax in question is an excise tax laid on various articles and things, among them candy. *The quantitative method of determining the character of this article is not what the statute contemplates. The word should be interpreted according to its clear import.* It has been declared that in statutes levying taxes the literal meaning of the words employed is most important because such statutes are not to be extended by implication beyond the clear import of the language used. Merriam case, 263 U. S. 179, 187 [4 Am. Fed. Tax Rep. 3673]; Gould *v.* Gould, 245 U. S. 151, 153 [3 Am. Fed. Tax Rep. 2958]. The plaintiff should have judgment. And it is so ordered."

In the case of **Malley v. Walter Baker & Co., 281 Fed. 41,** upon which the Petitioner relies, Judge Anderson of the Circuit Court of Appeals for the First Circuit sustained the regulation, saying (Opinion, pages 46 and 47):—

"The distinction turns, not so much on the composition of the article, as on the way or form in which it is sold, and upon the use made of it by its purchasers.

"We think the Court below erred in holding invalid this distinction made by the Commissioner as to sweet chocolate."

* * * * * * *

"It comes to this: Congress intended that various compounds of sugar and other ingredients, practically all of which are also food ingredients, should, when compounded, sold, and consumed as candy, a luxury, be subjected to this tax. The distinction undertaken to be made by the department that sweet chocolate should be taxed when put up and sold in such form as to indicate that it was to be consumed as candy is

consumed, and not taxed when it was obvious from the packing or other circumstances surrounding the transaction that it was to be merely an ingredient for further manufacture is a sound distinction."

The decision of Judge Morton in the District Court of Massachusetts, which was held error by Judge Anderson, contains the following language, which, when read aloud, sounds like an echo of decisions of this Court herein cited:

"What Congress intended by the word 'candy' in the statute was a certain substance, a certain kind of thing. I am not called upon to define it. All I am called upon to say, and all I do say about it, is that I think chocolate is a distinct, separate substance by itself, and therefore is not within the scope of 'candy' and cannot be brought within that scope by a regulation."

It is a curious fact, heretofore noted, that while, in the cases at bar, the learned trial Judge, Kirkpatrick, *J.*, felt that the rule of comity required him to follow the decision of the Court of Appeals for the First Circuit in the **Baker Case** (Rec. p. 26), *he nevertheless stated that he had "given no weight to the Treasury Regulation"* (Rec. p. 26). The Circuit Court of Appeals for the Third Circuit, in its opinion by Judge Avis, not only condemned the regulation but refused to follow the **Baker Case** in any of its conclusions (Rec. p. 98):—

"The case of Malley *v.* Walter Baker & Co. (C. C. A. 1) 281 F. 41, is strongly relied upon by the appellee; it being the contention that this case is controlling as establishing a precedent which in effect should be followed. There is a marked difference in the facts as submitted in the two cases. In the Malley Case there was no decision upon the question of what Congress

intended to do, except from the construction of the statutes, and it is apparent that no evidence with relation to the prior attitude of Congress, or the proceedings of the committees of Congress in consideration of the bills, was submitted to the court considering that case. We are not able to follow that court in its inclusion of sweet chocolate and sweet milk chocolate in the technical definition of the word 'candy,' or in its conclusion that the Commissioner, with the approval of the Secretary, had the power and authority under the respective revenue laws to substitute his ruling for the plain action of Congress."

The test which Judge Anderson adopted in the Baker case has likewise been repudiated by this Court in **Benzinger v. United States, 192 U. S. 38.** In that case the question was whether certain plaster images of saints and angels were *"casts of sculpture"* under the free list of the tariff act of 1897 or *"church statues, composed of plaster of Paris, decorated,"* carrying under the same act a 45% duty. It was contended by witnesses and counsel for the Government that "casts of sculpture" were only "such classes of plaster casts or clay or marble or bronze as are to stand singly and alone, and not to be sold in endless numbers"—in other words that the test was the use to which the article was destined rather than some distinguishing physical characteristic of the article itself. In refusing to follow this test the Court said (p. 48):—

"We think the last definition is inaccurate and inadmissible. Under this view, whether a figure is a cast of sculpture or not, does not in the least depend upon how it is made. It is the use to which it is destined which is to determine what it is in fact. If there are to be a great many of them, to be 'sold in endless numbers,' they are not casts of sculpture, no matter how they are made, and if they are to 'stand singly' and 'be exhibited temporarily,' then they are

such casts. We are not satisfied as to the correctness or completeness of this definition. *Whether in one case the cast is for the use of the sculptor only or in the other is destined to be reproduced indefinitely, we think is not material.*"

A reason strongly urged by the Government (Petitioner's Brief, pp. 17-18) is that, if the decision of the Court below is affirmed, all of the taxes collected under the regulations in question from manufacturers of sweet chocolate have been wrongfully collected, and that the result of such a decision of this Court would be a more favorable treatment to the respondents than has been accorded to other similar manufacturers.

There would be no novelty in that situation in these United States, at least since March 1, 1913, during which many taxes have been wrongfully collected by the Government, and the ultimate decisions of this Court have protected certain taxpayers from such wrongful collections without benefit to others who have paid without protest.

It cannot be said, however, that merely because other manufacturers have paid taxes on sweet chocolate these respondents should now be estopped to claim their legal rights.

There is no evidence that the decision in the Baker case, *supra, which decided that a jury in the District Court should find whether sweet chocolate was candy as a question of fact,* ultimately resulted in the collection of any taxes from the Baker Company. It may fairly be assumed that astute counsel for the Government, having secured the decision from the Circuit Court of Appeals of the First Circuit of a scope far beyond any reasonable expectation which the Government could have had when that appeal was taken, may have graciously relieved the taxpayer of any burden of taxation by a settlement eminently satisfactory, with a result that left the Government in possession of a judicial decision for use as a weapon against other objecting manufacturers of sweet chocolate. The effect, however, upon these respondents was not that.

These cases have wended their weary way for more than ten years when the first claim for refund was filed. The filing of such claim is a fact which it may be assumed was a matter of common knowledge in the trade which, as the record shows, has such intimate knowledge of the affairs of all of its members (see hearings before House and Senate Committees on Revenue Act of 1921). If, with the knowledge that these respondents were denying the Government's right of taxation here claimed, other manufacturers of sweet chocolate paid their taxes without protest, there is certainly no basis for the claim made through the benevolent protectorate temporarily asserted by the Government that the Court should deny these respondents their legal rights.

Mr. Justice Sutherland, speaking for this Court in the recent case of **Crooks v. Harrelson (supra),** quotes, with approval, Lord Cairns to the effect that, "if there be admissible in any statute, what is called an "equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

In the recent case of **Burnet v. Niagara Falls Brewing Company, U. S. , 75 L. ed. 340.** Mr. Justice Butler said (p. 343):—

> "It is a familiar rule that tax laws are to be liberally construed in favor of taxpayers." (See also cases there cited.)

Surely the record in this case shows as great a difference between "candy" and "chocolate," by the use of rules recognized as appropriate by this Court to ascertain the meaning of Congress, as has been found to exist, also for the purpose of ascertaining legislative distinction, between "motor vehicle" and "aircraft." The recent decision of this Court in **McBoyle v. United States, No. 552, October Term 1930,** may be referred to in support of the conclusions advocated by the respondents, and in that case Mr. Justice

Holmes, announcing a limitation upon the Act of Congress of October 29, 1919, c. 89, U. S. Code, Title 18, Section 408, said:—

> "* * * the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used. United States *v.* Thind, 261 U. S. 204, 209."

CONCLUSION.

It is respectfully submitted that the judgments of the learned Circuit Court of Appeals should be affirmed.

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APPENDIX.

SECTION 900 OF TITLE IX OF REVENUE ACTS OF 1918 AND 1921.

REVENUE ACT OF 1918.

TITLE IX.—EXCISE TAXES.

Sec. 900.—That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased.

(1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in

REVENUE ACT OF 1921.

TITLE IX.—EXCISE TAXES.

Sec. 900.—That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories thereof, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motor cycles (including tires inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in

subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

(4) Pianos, organs (other than pipe organs), piano players, graphophones, phonographs, talking machines, music boxes, and records used in connection with any musical instrument, piano player, graphophone, phonograph, or talking machine, 5 per centum;

(5) Tennis rackets, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basket-ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commer-

subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

cially known as sporting goods, 10 per centum;

(6) Chewing gum or substitutes therefor, 3 per centum;

(7) Cameras, weighing not more than 100 pounds, 10 per centum;

(8) Photographic films and plates other than moving-picture films, 5 per centum;

(9) Candy, 5 per centum;

(10) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the German Government in the present war, 10 per centum;

(11) Hunting and bowie knives, 10 per centum;

(12) Dirk knives, daggers, sword canes, stillettos, and brass or metallic knuckles, 100 per centum;

(13) Portable electric fans, 5 per centum;

(14) Thermos and Thermostatic bottles, carafes,

(4) Cameras, weighing not more than 100 pounds, and lenses for such cameras, 10 per centum;

(5) Photographic films and plates (other than moving picture films), 5 per centum;

(6) Candy, 3 per centum;

(7) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, 10 per centum;

(8) Hunting and bowie knives, 10 per centum;

(9) Dirk knives, daggers, sword canes, stilettos, and brass or metallic knuckles, 100 per centum;

jugs, or other thermostatic containers, 5 per centum;

(15) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(16) Automatic slot-device vending machines, 5 per centum, and automatic, slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(17) Liveries and livery boots and hats, 10 per centum;

(18) Hunting and shooting garments and riding habits, 10 per centum;

(19) Articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value, 10 per centum;

(20) Yachts and motor boats not designed for trade,

(10) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(11) Automatic slot-device vending machines, 5 per centum, and automatic slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(12) Liveries and livery boots and hats, 10 per centum;

(13) Hunting and shooting garments and riding habits, 10 per centum;

(14) Yachts and motor boats not designed for trade,

fishing, or national defense; and pleasure boats and pleasure canoes if sold for more than $15, 10 per centum; and

(21) Toilet soap and toilet soap powders, 3 per centum;

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 600 of the Revenue Act of 1917, be in lieu of such tax.

fishing, or national defense; and pleasure boats and pleasure canoes if sold for more than $100, 10 per centum.

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 900 of the Revenue Act of 1918, be in lieu of such tax.

DEFINITIONS*

PROCLAIMED AND ESTABLISHED

BY THE SECRETARY OF AGRICULTURE IN COLLABORATION WITH THE ASSOCIATION OF OFFICIAL AGRICULTURAL CHEMISTS AND OTHER EXPERTS AND PUBLISHED IN "STANDARDS OF PURITY FOR FOOD PRODUCTS."

IN ACCORDANCE WITH THE ACT OF CONGRESS APPROVED JUNE 3, 1902, 32 STAT. L. 286, 296 AND ACTS SUPPLEMENTAL THERETO

"FOR THE GUIDANCE OF THE OFFICIALS OF THE VARIOUS STATES AND OF THE COURTS OF JUSTICE."

Reference	CANDY	CHOCOLATE

CIRCULAR No. 10
of the Department of Agriculture.

Issued Nov. 20, 1903.

NOTE:—This is the first publication of the series known as "Standards of Purity for Food Products."

"3. The definitions are so framed as to exclude from the articles defined substances not included in the definitions." (p. 3.)

"6. The names of food products herein defined usually agree with existing American trade or manufacturing usage, but where such usage is not clearly established or where trade names confuse two or more articles for which specific designations are desirable, prefer-

CANDY.

Definition.

"1. *Candy* is a product prepared from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials.

Standard.

"2. *Standard candy* is candy containing no terra alba, barytes, talc, chrome yellow, or other mineral substances or poisonous colors or flavors or other ingredients injurious to health." (p. 8.)

COCOA AND COCOA PRODUCTS.

Definitions.

"3. *Chocolate, plain or bitter chocolate liquor*, is the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents except the germ.

Standard.

"*Standard chocolate* is chocolate containing not more than three (3) per cent of ash insoluble in water, three and fifty hundredths (3.50) per cent of crude fiber and nine (9) per cent of starch nor less than forty-five (45) per cent of cocoa fat.

Definition.

"4. *Sweet chocolate* and *chocolate coatings* are plain chocolate mixed with sugar

* Respondents' Exhibit No. 13 (Record, page 46).

DEFINITIONS—(Continued).

AUTHORIZED BY ACT OF CONGRESS FOR GUIDANCE OF THE COURTS OF JUSTICE.

Reference	CANDY	CHOCOLATE
ence is given to one of the several trade names applied." (p. 5.) "For the primary definitions and standards and for the compilation of data for standards and consistent assistance in the revision of schedules the committee is greatly indebted to the following persons: * * * Charles A. Crampton, M. D., chemist of the Bureau of Internal Revenue, referee on beverages, including cocoa and cocoa products; * * *" (p. 2.)		(sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. *Standard.* "*Standard sweet chocolate and standard chocolate coating* are sweet chocolate and chocolate coating containing in the sugar—and fat—free residue no higher percentage of either ash, fiber, or starch than is found in the sugar—and fat—free residue of plain chocolate." (p. 12.)

CIRCULAR No. 13
of the Department of Agriculture.

Issued Dec. 20, 1904.
(Supplemental to Circular No. 10.)

CANDY.

"1. *Candy* is a product made from a saccharine substance or substances with or without the addition of harmless coloring, flavoring, or filling materials and contains no terra alba, barytes, talc, chrome yellow,

COCOA AND COCOA PRODUCTS.

"3. *Chocolate, plain* or *bitter;* or *chocolate liquor,* is the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents except the germ, and contains not more than three (3) per

DEFINITIONS—(Continued).

AUTHORIZED BY ACT OF CONGRESS FOR GUIDANCE OF THE COURTS OF JUSTICE.

Reference	CANDY	CHOCOLATE
"3. The definitions are so framed as to exclude from the articles defined substances not included in the definitions." (p. 5.) "6. The names of food products herein defined usually agree with existing American trade or manufacturing usage, but where such usage is not clearly established or where trade names confuse two or more articles for which specific designations are desirable, preference is given to one of the several trade names applied." (p. 5.)	or other mineral substances, or poisonous colors or flavors, or other ingredients injurious to health." (p. 9.)	cent of ash insoluble in water, three and fifty hundredths (3.50) per cent of crude fiber, and nine (9) per cent of starch, and not less than forty-five (45) per cent of cocoa fat. "4. *Sweet chocolate* and *chocolate coatings* are plain chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials, and contain in the sugar- and fat-free residue no higher percentage of either ash, fiber, or starch than is found in the sugar- and fat-free residue of plain chocolate." (p. 12.)

CIRCULAR No. 17
of the Department of Agriculture.
Issued March 9, 1906.
(Supplemental to Circular No. 13.)

NOTE:—This circular covers only "Fruit and Fruit Products," "Flavoring Extracts," "Edible Vegetable Oils" and "Salt."

DEFINITIONS—(Continued).

AUTHORIZED BY ACT OF CONGRESS FOR GUIDANCE OF THE COURTS OF JUSTICE.

Reference	CANDY	CHOCOLATE
CIRCULAR No. 19 of the Department of Agriculture. Issued June 26, 1906. (Supplemental to Circulars Nos. 13 and 17.) In the preparation of this circular (No. 19) the Secretary had, in addition to his other advisors, the expert counsel of the Interstate Food Commission and it is stated (p. 3) that certain changes have been introduced in the schedules "for the purpose of securing increased accuracy of expression." "3. The definitions are so framed as to exclude from the articles defined substances not included in the definitions." (p. 4.) "6. The names of food products herein defined usually agree with existing American trade or manufacturing usuage; but where such usuage is not clearly established or where trade names confuse two or more articles for which specific designations are desirable, preference is given to one of the several trade names applied." (p. 4.)	CANDY. "1. *Candy* is a product made from a saccharine substance or substances with or without the addition of harmless coloring, flavoring or filling materials and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug." (pp. 10 and 11.)	COCOA AND COCOA PRODUCTS. "3. *Chocolate, plain chocolate, bitter chocolate, chocolate liquor, bitter chocolate coatings,* is the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents, except the germ, and contains not more than three (3) per cent of ash soluble in water, three and fifty hundredths (3.50) per cent of crude fiber, and nine (9) per cent of starch, and not less than forty-five (45) per cent of cocoa fat. "4. *Sweet chocolate, sweet chocolate coatings,* chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials, and contains in the sugar- and fat-free residue no higher percentage of either ash, fiber, or starch than is found in the sugar- and fat-free residue of chocolate." (p. 17.)

DEFINITIONS—(Continued).

AUTHORIZED BY ACT OF CONGRESS FOR GUIDANCE OF THE COURTS OF JUSTICE.

Reference	CANDY	CHOCOLATE.
CIRCULAR No. 195 of the Department of Agriculture. Issued May 14, 1919. (Supplemental to Circulars Nos. 13, 17 and 19.)	CANDY. "1. **Candy** is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug." (p. 11.)	CACAO PRODUCTS. "3. **Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings,** is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ. "4. **Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings,** contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat. "5. **Sweet chocolate, sweet chocolate coatings,** is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. "6. **Sweet chocolate, sweet chocolate coatings,** contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate." (p. 18.) "11. **Milk chocolate, milk cocoa, sweet milk chocolate,** or **sweet milk cocoa,** respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa, which contains not less than twelve per cent (12%) of whole milk solids in the finished product." (p. 19.)

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LEGISLATIVE HISTORY*

SHOWING REFERENCES BY CONGRESS TO CHOCOLATE, *EO NOMINE*, AS CONSTANTLY DISTINGUISHED FROM CANDY IN THE FEDERAL REVENUE STATUTES FROM THE YEAR 1792 TO PRESENT DATE.

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
Tariff Act.	**Aug. 10, 1790.** 1 Stat. L. 180. 1st Congress Sess. II, Chap. 39.	"Sugar *candy*,*** ten per centum ad valorem." (p. 181.)		"all fruits and *comfits*,***ten per centum ad valorem." (p. 181.)	
Tariff Act.	**May 2, 1792.** 1 Stat. L. 259. 2nd Congress Sess. I, Chap. 27.				"***Chocolate***, per pound, three cents." (p. 259.)
Tariff Act.	**June 7, 1794.** 1 Stat. L. 390. 3rd Congress Sess. I, Chap. 54.	"Sugar *candy*," five per cent. ad valorem in addition to existing tax. (p. 391.)		"all fruits and *comfits*," five per cent. ad valorem. (p. 391.)	
Tariff Act.	**Mar. 3, 1797.** 1 Stat. L. 503. 4th Congress Sess. II, Chap. 10.	"Sugar *candy*,*** nine cents per pound." (p. 504.)			

* Respondents' Exhibit No. 12 (Record, page 46).

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
Tariff Act. (Regulating allowance for tare in computing weight.)	Mar. 2, 1799. 1 Stat. L. 627. 5th Congress Sess. III, Chap. 22.	"Sugar *candy* in boxes, ten per cent." (p. 671.) (allowance for tare—not tax.)			"*Chocolate*, in boxes, ten per cent." (p. 671.) (allowance for tare—not tax.)
Tariff Act.	May 13, 1800. 2 Stat. L. 84. 6th Congress Sess. I, Chap. 66.	"Sugar *candy*," 2½ cents per pound in addition to existing tax. (p. 84.)			
Tariff Act.	Apr. 27, 1816. 3 Stat. L. 310. 14th Congress Sess. I, Chap. 107.	"Sugar *candy*, twelve cents per pound." (p. 312.)		"*comfits* or *sweetmeats*, preserved in sugar or brandy" 30% ad valorem. (p. 311.)	"*Chocolate*, three cents per pound." (p. 311.)
Tariff Act.	May 22, 1824. 4 Stat. L. 25. 18th Congress Sess. I, Chap. 136.				"On *chocolate*, four cents per pound." (p. 28.)
Tariff Act.	July 14, 1832. 4 Stat. L. 583. 22nd Congress. Sess. I, Chap. 227.			"*comfits* and *sweetmeats*, of all kinds, preserved in sugar or brandy." (p. 589.)	

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
Tariff Act.	**Aug. 30, 1842.** 5 Stat. L. 548. 27th Congress Sess. II, Chap. 270.	"Sugar ***candy***, six cents per pound." (p. 558.)	"on *confectionery* of all kinds, not otherwise specified, twenty-five per cent. ad valorem." (p. 558.)	"on *comfits*, on *sweetmeats*, or fruits preserved in molasses, sugar or brandy" 25% ad valorem. (p. 558.)	"***Chocolate***, four cents per pound." (p. 558.)
Tariff Act.	**July 30, 1846.** 9 Stat. L. 42. 29th Congress Sess. I, Chap. 74.		"*confectionery* of all kinds not otherwise provided for;" 30% ad valorem. (p. 45.)	"*comfits*, *sweetmeats*, or fruit preserved in sugar, brandy or molasses," 40% ad valorem. (p. 44.)	"***Chocolate***" 20% ad valorem. (p. 47.)
Combined Tariff and Internal Revenue Act.	**Mar. 2, 1861.** 12 Stat. L. 178. 36th Congress Sess. II, Chap. 68.	"Sugar ***candy***, four cents per pound." (p. 180.)	"*confectionery* of all kinds, not otherwise provided for, thirty per cent ad valorem." (p. 180.)	"*comfits*, *sweetmeats*, or fruits preserved in sugar, brandy or molasses, not otherwise provided for" 30% ad valorem. (p. 191.)	"***Chocolate***" 20% ad valorem. (p. 189.)
Tariff Act.	**Aug. 5, 1861.** 12 Stat. L. 292. 37th Congress Sess. I, Chap. 45.	"Sugar ***candy***, six cents per pound." (p. 292.)			"***Chocolate***, six cents per pound." (p. 592.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
Tariff Act.	**Dec. 24, 1861.** 12 Stat. L. 330. 37th Congress Sess. II, Chap. 2.	"Sugar *candy*, eight cents per pound." (p. 330.)			
War Revenue Act of 1862.	**July 1, 1862.** 12 Stat. L. 432. 37th Congress Sess. II, Chap. 119.	"Sugar *candy*,*** one cent per pound." (p. 463.)	"all *confectionery*, made wholly or in part of sugar, one cent per pound." (p. 463.) also:— "*Confectioners* shall pay ten dollars for each license. Every person who sells at retail *confectionery*, *sweetmeats*, *comfits* or other *confects*, in any building, shall be regarded as a *confectioner* under this act." (p. 457.)		"***Chocolate*** and cocoa prepared, one cent per pound." (p. 463.)
Tariff Act.	**July 14, 1862.** 12 Stat. L. 543. 37th Congress Sess. II, Chap. 163.	"Sugar *candy*, not colored, six cents per pound." (p. 544.)	"all other *confectionery*, made wholly or in part of sugar, and on sugars after being refined, when tinctured, colored, or in any way adulterated, ten cents per pound." (p. 544.)	"*comfits*, *sweetmeats*, or fruits preserved in sugar, brandy or molasses, not otherwise provided for." 5% ad valorem in addition to existing tax. (p. 556.)	"***Chocolate*** and cocoa prepared, one cent per pound." This is in addition to existing tax. (p. 550.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
War Revenue Act of 1863.	**Mar. 3, 1863.** 12 Stat. L. 713. 37th Congress Sess. III, Chap. 74.	"Sugar *candy*." Tax 2¢ per lb.; 3¢ per lb.; or 5% ad valorem; (same rates as in next column). (p. 717.)	"and all *confectionery* made wholly or in part of sugar, valued at 14 cents per pound or less, 2 cents per pound; when valued at exceeding 14 cents and not exceeding 40 cents per pound, 3 cents per pound; when valued at exceeding 40 cents per pound, or when sold otherwise than by the pound, 5% ad valorem." (p. 717.)		
Tariff Act.	**June 30, 1864.** 13 Stat. L. 202. 38th Congress Sess. I, Chap. 171.	"Sugar *candy*, not colored, ten cents per pound." (p. 202.)	"On all other *confectionery*, not otherwise provided for, made wholly or in part of sugar, and on sugars, after being refined, when tinctured, colored, or in any way adulterated, valued at 30 cents per pound or less, 15 cents per pound. On all *confectionery* valued above 30 cents per pound, or when sold by the box, package or otherwise than by the pound, 50% ad valorem." (p. 202.)		

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
War Revenue Act of 1864.	June 30, 1864. 13 Stat. L. 223. 38th Congress Sess. I, Chap. 173.	"Sugar *candy*." Tax, 2¢ per lb.; 4¢ per lb.; or 10% ad valorem, depending on price for which sold. (p. 266.)	"and all *confectionery* made wholly or in part of sugar at not exceeding 20 cents per pound a duty of 2 cents per pound, exceeding 20 and not exceeding 40 cents per pound, a duty of 4 cents per pound, when exceeding 40 cents per pound or sold by the box, package or otherwise than by the pound a duty of 10% ad valorem." (p. 266). Also:— "*Confectioners* shall pay ten dollars for each license. Every person who sells at retail *confectionery*, *sweetmeats*, *comfits* or other *confects*, in any building, shall be regarded as a *confectioner* under this Act:" (p. 254.)		"On *chocolate* and cocoa prepared, a duty of one and a half cent per pound." (p. 266.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
War Revenue Act of 1866.	July 13, 1866. 14 Stat. L. 98. 39th Congress Sess. I, Chap. 184.	"Sugar *candy*." Tax, 2¢ per lb.; 4¢ per lb.; or 10% ad valorem, depending on price for which sold. (p. 129.)	"and all *confectionery* made wholly or in part of sugar." Tax, 2¢ per lb.; 4¢ per lb.; or 10% ad valorem, depending on price for which sold. (p. 129.) Also:— "*Confectioners* shall pay ten dollars. Every person who sells at retail *confectionery, sweetmeats, comfits* or other *confects*, in any building shall be regarded as a *confectioner*." (p. 118.)		"On *chocolate* and cocoa prepared, a tax of one and a half cent per pound." (p. 130.)
Combined Tariff and War Revenue Act.	July 14, 1870. 16 Stat. L. 256. 41st Congress Sess. II, Chap. 255.				"On *chocolate*, seven cents per pound." An import duty. (p. 262.)
Tariff Act.	June 6, 1872. 17 Stat. L. 230. 42nd Congress Sess. II, Chap. 315.				"On *chocolate*, five cents per pound." (p. 231.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
Combination of War Revenue and Tariff Acts.	Mar. 3, 1883. 22 Stat. L. 488. 47th Congress Sess. II, Chap. 121.	"Sugar ***candy***, not colored, five cents per pound." (Under "Schedule E, Sugar," p. 502.)	"All other *confectionery*, not specifically enumerated or provided for in this act, made wholly or in part of sugar, and on sugars after being refined, when tinctured, colored, or in any way adulterated valued at 30 cents per pound or or less, 10 cents per pound. *Confectionery* valued at 30 cents per pound, or when sold by the box, package or otherwise than by the pound 50% ad valorem. (Under "Schedule E, Sugar," p. 502.)	"*Comfits, sweetmeats*, or fruits preserved in sugar, spirits, sirup or molasses, not otherwise specified or provided for in this act, and jellies of all kinds, 35% ad valorem." (p. 504.)	"***Chocolate***, two cents per pound." (Under "Schedule G. Provisions." p. 504.)
Tariff Act.	Oct. 1, 1890. 26 Stat. L. 567. 51st Congress Sess. I, Chap. 1244.	"Sugar ***candy***." (Under "Schedule E, Sugar." p. 584.) "Orange peel and lemon peel, preserved or ***candied***, two cents per pound." (p. 587.)	"and all *confectionery*, including *chocolate confectionery* made wholly or in part of sugar, valued at twelve cents or less per pound and on sugars after being refined, when tinctured, colored, or in any way adulterated, five cents per pound."	"*Comfits, sweetmeats* and fruits preserved in sugar, sirup, molasses or spirits not specially provided for in this act, and jellies of all kinds 35% ad valorem." (Under Schedule G, Subsection "Fruits and Nuts." p. 587.)	"***Chocolate*** (other than *chocolate confectionery* and ***chocolate*** commercially known as *sweetened chocolate*) two cents per pound." (Under "Schedule G, Agricultural Products and Provisions." (p. 588.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
Tariff Act.	(1890—Cont.)		"All other *confectionery*, including *chocolate confectionery*, not specially provided for in this act, fifty per cent. ad valorem." (Under "SCHEDULE E, SUGAR." p. 534.)		
Tariff Act.	Aug. 27, 1894. 28 Stat. L. 509. 53rd Congress Sess. II, Chap. 349.	"Sugar *candy*." (Under "SCHEDULE E, SUGAR." p. 521.) "Orange peel and lemon peel, preserved or *candied*, thirty per cent. ad valorem." (p. 524.)	"and all *confectionery*, made wholly or in part of sugar, and on sugars after being refined, when tinctured, colored or in any way adulterated, thirty-five per cent. ad valorem." (Under "SCHEDULE E, SUGAR." p. 521.)	"*Comfits, sweetmeats*, and fruits preserved in sugar, sirup or molasses, not specially provided for in this Act, prepared or desiccated cocoanut or copra, and jellies of all kinds, thirty per cent. ad valorem." (Under Schedule G, Subsection "FRUITS AND NUTS. p. 524.)	"*Chocolate, sweetened, flavored, or other*, valued at 35 cents per pound or less 2 cents per pound; valued at exceeding 35 cents per pound and *chocolate confectionery* 35% ad valorem." (Under "SCHEDULE G, AGRICULTURAL PRODUCTS AND PROVISIONS." p. 524.)
Tariff Act.	July 24, 1897. 30 Stat. L. 151. 55th Congress Sess. I, Chap. 11.	"Sugar *candy*." (Under "SCHEDULE E, SUGAR." p. 168.) "Orange peel or lemon peel, preserved, *candied*	"and all *confectionery* not specially provided for in this Act, valued at fifteen cents per pound or less, and on sugars after being refined, when tinctured, colored or in any	"*Comfits, sweetmeats*, and fruits preserved in sugar, molasses, spirits, or in their own juices, not specially provided for in this Act one cent per	"*Chocolate* and *cocoa*, prepared or manufactured, not specially provided for in this Act." Tax, 2½¢ per lb.; 2½¢ per lb. plus 10% ad valorem; 5¢

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
Tariff Act.	(1897—Cont.)	or dried***two cents per pound." (p. 172.)	way adulterated, four cents per pound and fifteen per centum ad valorem; valued at more than fifteen cents per pound fifty per cent. ad valorem." (Under "SCHEDULE E, SUGAR." p. 168.)	pound and thirty-five per centum ad valorem." (Under Schedule G, Subsection "FRUITS AND NUTS." p. 171.)	per lb. plus 10% ad valorem; or 50% ad valorem, depending on price for which sold. (Under "SCHEDULE G, AGRICULTURAL PRODUCTS AND PROVISIONS." p. 172.)
Tariff Act,	Aug. 5, 1909. 36 Stat. L. 11. 61st Congress Sess. I, Chap. 6.	"Sugar *candy*." (Under "SCHEDULE E, SUGAR." p. 34.) "Orange peel or lemon peel, preserved, *candied*, or dried," etc. (p. 38.)	"and all *confectionery* not specially provided for in this section, valued at fifteen cents per pound or less, and on sugars after being refined, when tinctured, colored or in any way adulterated, four cents per pound and fifteen per centum ad valorem; valued at more than fifteen cents per pound, fifty per cent. ad valorem." (Under "SCHEDULE E, SUGAR." p. 34.)	"*Comfits, sweetmeats*, and fruits of all kinds preserved or packed in sugar, or having sugar added thereto, or preserved or packed in molasses, spirits or their own juices, * * * one cent per pound and thirty-five per cent. ad valorem." (Under Schedule G, listed with Fruits, etc., p. 37-38.)	"*Chocolate* and cocoa, prepared and manufactured, not specially provided for in this section, valued at not over fifteen cents per pound, two and a half cents per pound; valued above 15¢ and not over 24¢ per lb. 2½¢ per lb. and 10% ad valorem; valued above 24¢ and not above 35¢ per lb., 5¢ per lb. and 10% ad valorem, valued above 35¢ per

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
Tariff Act.	(1909—Cont.)		Also:— "biscuits, wafers, cakes and other baked articles, by whatever name known, composed in whole or in part of eggs, or any kind of flour or meal, or other material, when sweetened with sugar, honey, molasses or other material or combined with *chocolate, nuts, fruit,* or *confectionery* of any kind, or both so sweetened and combined, and without regard to the component material of chief value, valued at 15¢ per lb. or less, 3¢ per lb. and 15% ad valorem; valued at more than 15¢ per lb. 50% ad valorem." (p. 36.)		lb., 50% ad valorem * * *; powdered cocoa, *unsweetened*, 5¢ per lb." (Under "SCHEDULE G, AGRICULTURAL PRODUCTS AND PROVISIONS." p. 39.) "***Chocolate,***" mentioned as one separate element in a confection combination. (p. 36.)
Tariff Act.	July 26, 1911. 37 Stat. L. 4. 62nd Congress Sess. I, Chap. 3.	"***Candied*** peel." "***Candied*** popcorn." "***Candied*** nuts." "***Candied*** fruits." "Sugar ***candy***." 32½% ad valorem. (p. 4.)	"*confectionery* of all kinds," 32½% ad valorem. (p. 4.) "Biscuits, wafers, cakes, and other baked articles, composed in whole or in part of eggs or any kind of flour or meal, when combined with *chocolate, nuts, fruits* or *confectionery*." (p. 4.)		"***Chocolate,***" mentioned as one separate element in a confection combination. (p. 4.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
Tariff Act.	Oct. 3, 1913. 38 Stat. L. 114. 63rd Congress Sess. I, Chap. 16.	"Sugar *candy*." (Under "SCHEDULE E, SUGAR, MOLASSES AND MANUFACTURES OF." (p. 131.) "Orange peel or lemon peel, preserved, *candied* or dried*** citron or citron peel, preserved, *candied* or dried 2 cents per pound." (p. 134.)	"and all *confectionery* not specially provided for in this Section, valued at fifteen cents per pound or less two cents per pound; valued at more than fifteen cents per pound twenty-five per centum ad valorem." (Under "SCHEDULE E, SUGAR, MOLASSES AND MANUFACTURES OF." p. 131.) Also:— "Biscuits, bread, wafers, cakes and other baked articles, and puddings, by whatever name known, containing *chocolate, nuts, fruit* or *confectionery* of any kind, and without regard to the component material of chief value, 25% ad valorem." (Under Schedule G. p. 132.)	"*comfits, sweetmeats* and fruits of all kinds preserved or packed in sugar, or having sugar added thereto or preserved or packed in molasses, spirits or their own juices*** twenty per centum ad valorem." (Under Schedule G, with fruits, etc. p. 134.)	"*Unsweetened chocolate* and cocoa, prepared or manufactured not specially provided for in this section, 8% ad valorem. *Sweetened chocolate* and cocoa, prepared or manufactured, not specially provided for in this section valued at 20 cents per pound or less, 2 cents per pound; valued at more than 20 cents per lb., 25% ad valorem." Also:— "*Chocolate,*" mentioned as one separate element in a confection combination. (p. 132.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
Revenue Act of 1918.	**Feb. 24, 1919.** 40 Stat.L.1057. 65th Congress Sess. III, Chap. 18.	"***Candy***, 5 per centum." (p. 1122.)			
Revenue Act of 1921.	**Nov. 23, 1921.** 42 Stat. L. 227. 67th Congress Sess. I, Chap. 136.	"***Candy***, 3 per centum." (p. 292.)			
Tariff Act.	**Sept. 21, 1922.** 42 Stat. L. 858. 67th Congress Sess. II, Chap. 356.	"Sugar ***candy***." (Under "Schedule 5, Sugar, Molasses and Manufactures of." p. 890.) "Citron peel*** ***candied***, or otherwise prepared." (p.893.) "Orange and lemon peel*** ***candied***, or otherwise prepared." (p.893.)	"and all *confectionery* not specially provided for, and sugar after being refined, when tinctured, colored, or in any way adulterated, 40% ad valorem." (Under "Schedule 5, Sugar, Molasses and Manufactures of." p. 890.) "Biscuits, wafers, cake, cakes, and similar baked articles, and puddings, all the foregoing by whatever name known, whether or not containing *chocolate, nuts, fruits* or *confectionery* of any kind, 30% ad valorem." (Under Schedule 7. p. 893.)		"***Chocolate*** and cocoa, sweetened or unsweetened, powdered or otherwise prepared, 17½% ad valorem, but not less than 2 cents per pound." (Under "Schedule 7, Agricultural Products and Provisions." p. 896.) "***Chocolate***," mentioned as a separate element in a confection combination. (p. 893.)

TREASURY REGULATIONS 47, ARTS. 22 AND 19, ALSO SUGGESTED STATUTORY DEFINITION SUBMITTED TO CONGRESS BY SECRETARY OF TREASURY BUT NOT ADOPTED BY CONGRESS.

COLUMN 1.

ARTICLE 22, REGULATION 47 UNDER REVENUE ACT OF 1918. ISSUED BY COMMISSIONER OF INTERNAL REVENUE with approval of SECRETARY OF THE TREASURY MAY 1, 1919. also OFFICE RULING OF COMMISSIONER ISSUED MAY 10, 1919.

"Art. 22. Candy.—Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glace or candied fruit and nuts,

COLUMN 2.

DEFINITION WHICH THE SECRETARY OF THE TREASURY BY HIS LETTER OF NOV. 3, 1919 SUGGESTED THAT CONGRESS incorporate in REVENUE ACT OF 1921.

"Strike out subdivision (9) and insert:

Candy, 5 per centum. Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glace or candied fruits and nuts

COLUMN 3.

REVISED ARTICLE 22, REGULATION 47 UNDER REVENUE ACT OF 1918. ISSUED BY COMMISSIONER OF INTERNAL REVENUE with approval of SECRETARY OF THE TREASURY DEC. 27, 1920.

"Art. 22. Candy.—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gumdrops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glace or candied fruits and nuts

COLUMN 4.

ARTICLE 19, REGULATION 47 UNDER REVENUE ACT OF 1921 ISSUED BY COMMISSIONER OF INTERNAL REVENUE with approval of SECRETARY OF THE TREASURY. JANUARY 6, 1922.

"Art. 19. Candy.—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gumdrops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glace or candied fruits and nuts

Regulation 47, Art. 22. May 1, 1919.	Letter of Sec. of Treas. Nov. 3, 1919.	Revised Regulation 47, Art. 22. Dec. 27, 1920.	Regulation 47, Art. 19. Jan. 6, 1922.
	not specified in paragraph (*b*) of this subdivision,	not specified in paragraph (*b*) of this subdivision;	not specified in paragraph (*b*) of this subdivision;
popcorn and other cereals or cereal products	popcorn and other cereals or cereal products not specified in paragraph (*b*) of this subdivision,	popcorn and other cereals or cereal products not specified in paragraph (*b*) of this subdivision,	popcorn and other cereals or cereal products not specified in paragraph (*b*) of this subdivision,
mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows,	mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows,	mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and chocolate covered marshmallows;	mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and chocolate covered marshmallows;
candy cough drops and		candy cough drops, sold in bulk and without remedial claims (see Art. 16 Regulations 51);	candy cough drops, sold in bulk and without remedial claims;
sweetened licorice not taxed as cough drops,	sweetened licorice not taxed as cough drops under section 907,	sweetened licorice not taxed as cough drops under section 907;	sweetened licorice;
sweet chocolate and sweet milk chocolate whether plain or mixed with fruit or nuts;	*sweet chocolate and sweet milk chocolate whether plain or mixed with fruit or nuts;*	*sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts,* not specified in paragraph (*b*) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (*b*) of this subdivision;	*sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts,* not specified in paragraph (*b*) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (*b*) of this subdivision;

Regulation 47, Art. 22. May 1, 1919.	Letter of Sec. of Treas. Nov. 3, 1919	Revised Regulation 47, Art. 22. Dec. 27, 1920.	Regulation 47, Art. 19. Jan. 6, 1922.
and all similar articles however designated:	and all similar articles however designated;	and all similar articles however designated;	and all similar articles however designated;
	but	but	but
It does not include, however, cereal breakfast foods, cake and pastries, nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste.	(*b*) Does not include cereal breakfast foods, cake, and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste.	(*b*) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste,	(*b*) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste,
		powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste,	powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste,
If a manufacturer of glace or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto, showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale	nor glace or candied fruits	glace or candied fruit peel and citron, or sweet chocolate, glace or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.	glace or candied fruit peel and citron, or sweet chocolate, glace or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.
	purchased for and used in the manufacture of food products such as ice cream, cakes and pastries;		

Regulation 47, Art. 22. May 1, 1919.	Letter of Sec. of Treas. Nov. 3, 1919.	Revised Regulation 47, Art. 22. Dec. 27, 1920.	Regulation 47, Art. 19. Jan. 6, 1922.
thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer and on which he has performed no further process of manufacture the tax attaches only to such portion of the goods sold as have been manufactured by him." The Commissioner subsequently ruled in response to telegraphic inquiry under date of May 10, 1919, as follows:— "Sweet chocolate sold in parcels of such size and shape that it is commonly purchased and consumed as candy by the general public is taxable as candy, but sweet chocolate sold in large packages not as candy but intended for further manufacturing purposes is not taxable provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes."		Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items."	Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items."

DICTIONARY DEFINITIONS.

AS FOUND IN THE EDITIONS OF THE DICTIONARIES NAMED IN THE CONGRESSIONAL LIBRARY.

Name of Dictionary.	Date of Publication.	CANDY.	CHOCOLATE.
Dr. Johnson's.	1784–1805		"The cake or mass, made by grinding the kernel of the cacao-nut with other substances."
Universal Pronouncing Dictionary—Wright.			"Chocolate—(Span.)—A paste or cake composed of the kernel of cacao, with other ingredients, usually a little sugar, cinnamon or vanilla. The nut is first ground fine, mixed with the ingredients, and put in a mould; the liquor is made by dissolving chocolate in boiling water."
Oglivie's Imperial Dictionary.	1883	"A solid preparation of sugar or molasses either alone or in combination with other substances, to flavor, color, or give it the desired consistency."	"A paste or cake composed of the kernels of the Theobroma Cacao ground and combined with sugar and vanilla, cinnamon, cloves, or other flavoring substances."
Stormouth's.	1885	"Crystallized sugar, sugar compounded with anything else: v. to boil or dress in sugar; to cover or incrust with sugar; to form sugar into crystals."	"A powder or paste prepared from the beans of the cacao-nut, used in making the beverage so called."

DICTIONARY DEFINITIONS (Continued).

NAME OF DICTIONARY.	DATE OF PUBLICATION.	CANDY.	CHOCOLATE.
Murray's.	1893	"Crystallized sugar made by repeated boiling and slow evaporation, more fully called sugar candy; also any confection made of, or incrusted with this. (In U. S. used more widely than in Great Britain, including toffy, and the like.)"	"A paste or cake composed of the seeds of the cacao-fruit roasted and ground, sweetened and flavored with vanilla and other substances."
Students' Edition of a Standard Dictionary.	1898	"Sugar or molasses, or both, formed into a confection by any means."	"Cacao-seeds roasted and ground and often mixed with sugar and flavoring."
Worcester's.	1908	"Sugar in the form of large crystals deposited from a dense sirup, or of a compact concretion produced by long-continued boiling of a solution of sugar, or of molasses; a conserve of sugar."	"A preparation made of the seeds or nuts of the Theobroma Cacao."
Concise Oxford—Fowler.	1911	"Crystallized sugar made by repeated boiling and slow evaporation."	"(Cake) of cacao-seed paste."
New Universal Graphic —Winston.	1924	"A solid confection of sugar, combined with flavoring or coloring substances."	"A paste of the roasted kernels of the cacao-nut."

DICTIONARY DEFINITIONS (Continued).

NAME OF DICTIONARY.	DATE OF PUBLICATION.	CANDY.	CHOCOLATE.
New Standard Dictionary.	1913–1925	"Sugar or molasses, or both, formed into a confection, usually by boiling; in England, commonly called a sweet, and in Australia, lolly." "Candy, which is made into a variety of forms, is generally flavored and often colored with various substances, and sometimes combined with nuts, chocolate, etc. In England, the word is confined to confections of sugar, those of molasses being called toffy."	"A paste or cake, made of cacao-seeds roasted and ground and often mixed with sugar and some flavoring ingredients."
Webster's New International.	1910–1920–1927	"A more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystallizing, molding, or working it into the required shape. It is usually flavored or colored, and often contains fruits, nuts, etc. Also, any sweetmeat made of or coated with, a preparation of sugar or molasses, a piece of confectionery."	"A preparation composed of the roasted seeds of the cacao ground and mixed with other ingredients, usually sugar, and cinnamon or vanilla."